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The Legal Consequences of Living Together Outside of Marriage: A Canadian perspective and an American overview of the laws concerning nonmarital cohabitation and common law marriages.

©

by

BRYAN W. PRITCHARD

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF LAWS

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EDMONTON, ALBERTA

FALL, 1986

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DR. KENNETH WARD

To MERNA, whose unbounding and unselfish support made this thesis possible.

ABSTRACT

The purpose of this thesis is to analyze the growing instance of nonmarital cohabitation in contemporary society. It will be clearly established that such phenomenon is a significantly important legal concept and to this end empirical data will be examined. Various theories will be considered and legislative responses will be scrutinized.

As a necessary premise to the understanding of nonmarital cohabitation the concept of common law marriage will be distinguished from the so-called "common-law" relationship. The present legal consequences of cohabitation will be examined and contrasted with the status of the legal marriage. An American overview will be proferred and consideration will be given to the legality of cohabitation agreements and more specifically to "Cohabitation Contracts." The writer will attempt to state the law on the legal consequences of nonmarital cohabitation outside of marriage, on specific areas of legal concern, as of September 1, 1986.

In conclusion, the thesis will contend that existence of the common law marriage is possible in Canada, and, by way of a futuristic perspective, the writer will postulate the merging of nonmarital cohabitation with the concept of the common law marriage to offer a viable alternative to legal marriage in a fast changing society.

PREFACE

"Mr. Love stated "We both decided to be individual, separate people living our own lives and decided we wanted the relationship we could end any time. We didn't want to have to go through marriage ceremony or go through divorce court. They both have now realized that such a "creation" does not yet exist. Truely it was an impossible dream. It is now just as impossible to untangle the tangled web which they have woven as it was to live within it."

TWEEDY, J.
PRINCE EDWARD ISLAND SUPREME COURT.
Dwyer v. Love June 10, 1975

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First, I would like to express my deep gratitude and profound thanks to Professor Leonard Pollock, Q.C. for supervising this thesis. I appreciate the encouragement he has extended, without which, this work would undoubtedly not have been completed.

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I. Scope of Analysis

The scope of this thesis is to analyze the growing instance of nonmarital cohabitation between couples in Canada from the perspective of judicial reaction and adaptation to such phenomenon as it applies to specific areas of the law. The consequences flowing from the decisions, it is submitted, are of tantamount importance and should be of fundamental concern, not only to cohabitees specifically, but also to society as a whole. It will be shown that nonmarital cohabitation is a concept that presently defies social and legal definition and that has created a variety of judicial dilemnas as evidenced by the mosaic patterns of legal inconsistancies emerging from Courts at all levels of jurisdiction throughout Canada.

The thesis will clearly establish the significance of this phenomenon, discuss the various theories advanced in explanation for its emergence in contemporary society, examine empirical data on the subject matter and thoroughly analyze the position of the common law in some of the areas and issues of legal concern. Legislative response of both the Federal and Provincial governments will be scrutinized and the position of the various Law Reform Commissions, agencies, and institutions, together with material from other sources will be considered.

As a necessary part of understanding nonmarital cohabitation within modern society, the writer must distinguish this concept from the common law marriage. The

latter concept, although a separate and distinct legal entity is, by way of origin, integerally and inextricably intertwined with nonmarital cohabitation, both reifications having their roots in the common law of England. The complexities and intricacies involved in the distinction between such legal entities were inherited by Canada through the transportation of the colonists prior to, and further complicated by the enactment of the British North America Act, 1867. A historical review is therefore a condition precedent to any cogent analysis.

The arguments for and against the existence of the common law marriage in Canada will therefore be examined, the writer taking the position that not only do marriages recognized by common law exist, but that such unmistakable differences between this concept and nonmarital cohabitation will be of growing importance within a short few decades. The distinction, it will be argued, will be of enormous legal significance, or conversely, of no legal consequence at all, such being dependent upon whether the two concepts remain independent of each other, or merge to form a new entity, that will be legally recognised as an acceptable alternative to formal marriage.

Expressly omitted from this thesis will be that body of case law that considers "void" or "voidable" marriages in relation to the curative sections of the various Marriage Acts. It is the writer's contention that common law marriages operate outside legislative enactments, thereby

rendering consideration of such notions irrelevant. However, having made this statement, such must be qualified. It may be necessary to consider such cases from the viewpoint of the contents of obiter dictum as is relates to discussions on the validity of common law marriages, and as such will be given the appropriate weight in the formation of this thesis. Likewise, the status of both the common law marriage and nonmarital cohabitation as it relates to taxation is beyond the scope of this treatise. A rather noble attempt can be found in Winnifred Holland's book, Umarried Couples, Legal Aspects of Cohabitation, which will be referred to on other pertinent matters, throughout the latter part of this thesis.

Since no meaningful analysis can be completed without a discussion of the consequences flowing from the California Supreme Court's decision in Marvin v. Marvin, an American overview will be proferred for critical examination. At that juncture, consideration will also be specifically given to "Cohabitation Contracts" and the legality of agreements between cohabitees.

In conclusion, the writer will attempt to state the law and the legal consequences of nonmarital cohabitation outside of marriage, on those specific issues and areas of legal concern, the subject matter of this thesis.

II. The Legal Issues and Distinctions Between Nonmarital Cohabitation and Common Law Marriages.

"I will be the master of what is mine own
She is my goods, my chattels, she is my house
My household stuff, my field, my barn
My horse, my ox, my ass, my anything"

Petruchio: Shakespeare
Taming of the Shrew, 1596.

Before embarking on delineating the legal issues and distinctions between nonmarital cohabitation and the common law marriage, it may be useful to define "marriage" in the most widely accepted legal sense. Leaving aside the Bard's romantic notion of what a "wife" should be, legal reasoning tended to agree with Shakespeare - the wife was merely a chattel. Upon marriage, there was a legal fusion of man and wife, the woman transferring all ownership of her property to the husband in return for support for the duration of her natural life.

The classical definition of marriage was enunciated by Lord Penzance in Hyde v. Hyde and Woodmansee:[1]

[1](1866) 1 L.R. 130 (P.&D.).

> "It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom...I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

It has been argued that, based on this definition, there are four essential components to a marriage;[2] it must be voluntary, for life, heterosexual and monogamous. Provisions of the various provincial Marriage Acts[3] require that certain formalities be complied with in order to sustain a legal marriage; such requirements as the issuance of a licence,[4] consent of parents where appplicable,[5] and the solemnization of the marriage either in a civil ceremony, or a religious ceremony,[6] in the presence of witnesses.[7]

The concept of the common law marriage has been defined in Webster's Third New International Dictionary as:[8]

> "An agreement now not recognized in many jurisdictions as a legal marriage between a man and a woman to enter into the marriage relation without ecclesiastical or civil ceremony that in many

---

[2]P.M. Bomley, Family Law, London: Butterworths, 1981, pp.17-18.

[3]For example see Marriage Act, R.S.A. 1980, c.M-6, s.8.

[4]Id. ss.17-18.

[5]Id. s.2(a).

[6]Id. s.2(b).

[7]Id. s.9.

[8]Massachusette: Merriam Co., 1979, p.251.

> jurisdictions must be followed by cohabitation to be legally valid and is provable by the writings, declarations, or conduct of the parties."

Further elaboration is found in Black's Law Dictionary:[9]

> "One not solemnized in the ordinary way (i.e. non ceremonial) but created by an agreement to marry, followed by cohabitation. A consumated agreement to marry, between persons legally capable of making marriage contract, per verba de presenti, followed by cohabitation. Such marriage requires a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationsip of man and wife, and an assumption of marital duties and obligations."

Green & Long,[10] defines common law marriage as a non ceremonial or informal marriage by agreement entered into by a man and a woman having capacity to marry, ordinarily without compliance with such statutory formalities as the obtaining of a marriage license.

As can be readily seen, the basic factors involved in the creation of a valid common law marriage appear to be: (1) an agreement to marry between one man and one woman, (2) capacity to marry, (3) status or public recognition, (4) a permanent or lasting relationship, (5) cohabitation, and (6) consumation.[11]

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[9] Fifth Ed. St. Paul, Minn.: West Publishing Co., 1979, p.251.

[10] S. Green & J.V. Long, Marriage and Family Law Agreements, Colorado: McGraw-Hill, 1984, p.80.

[11] Bryan W. Pritchard, "An Analysis of the Concepts of the Common Law Marriage and the Meretricious Union" (1976), 21 R.F.L. 129, p.130.

The agreement to marry need not be in writing, or even verbally expressed, but may be inferred from the conduct of the parties. Secrecy is an absolute bar to a valid common law marriage. Conversely, it is essential that there be a "holding out" of the marriage to society. Cohabitation need not be for life, but must be of a reasonable duration.'[12] It has been effectively argued that cohabitation is only proof of the marriage,'[13] consequently, while present in most of the cases, may, or may not be an essential component in the constitution of a marriage.

A common law marriage may come into existence in two ways, either by consent per verba de praesenti or by per verba de futuro subsequente copula.'[14] The latter creates no legal obligations and gives no rise to change of status unless followed by consumation.

Upon analysis, it can be ascertained that the common law marriage differs from the legislatively sanctioned marriage, created under the various Marriage Acts, only to the extent that it does not comply with the formal requirements of such acts. That is to say, it operates exclusively outside of legislative authority, and, as the name implies, is a "marriage", legal in all respects,

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'[12]Id. p.130.

'[13]J. Brownlie & P.R.H. Webb, "Belligerent Occupation and Common Law Marriage" (1963), 39 Brit. Year Book of Int. Law 457.

'[14]Christine Davies, Family Law in Canada, Fourth Ed. of Power on Divorce and other Matrimonial Causes, Toronto: Carswell, 1984, p.16.

recognized by the common law.

Distinguished from, and not a part of, in any way, is the concept of nonmarital cohabitation, loosely referred to by a large segment of society, as "living common law". The term "living common law" and the common law marriage have been the subject of much confusion. In searching for examples that evidences the confusion surrounding the two distinct concepts of the common law marriage and nonmarital cohabitation, I strangely enough, found a prime example in a commentary on my own article on the subject matter, which was authored in 1976.'[15] In his commentary, Samuel Gampel,'[16] in an attempt to clarify the situation of confusion, succeeds only in muddying the waters even more. He attempted to refute the existence of the common law marriage both within Canada and elsewhere, without reference to any of the cases which categorically and conclusively prove otherwise.

Gampel states as an opening remark:'[17]

> "After reading Pritchard's article...it became clear to me that even lawyers had become so acclimatized to the notion that there actually was a legal relationship in Canada and elsewhere [my emphasis] known as "the common law marriage" (without quotation marks), and that they regard it as a self-evident category of marriage law."

'[15]Supra, Pritchard, n.11.

'[16]Samuel Gampel, "A Commentary on "An Analysis of the Concepts of the Common Law Marriage and the Meretricious Union" by Bryan W. Pritchard, 21 R.F.L. 129: Roman Cannon Law in the Church of England and the Confusion Between Common Law and Cannon Law: Family Law Reform in Relation to the So-Called Common Law Marriage"" (1977), 25 R.F.L. 271.

'[17]Id. p.271.

This astonishing position was obviously taken on the mistaken assumption that "even lawyers" confuse the concepts of "living common law" and common law marriage. In answer to his assertion, that common law marriages do not exist, and have never existed in Canada or elsewhere, it is perhaps technically correct to say, that while it has not been conclusively proven that common law marriages exist in Canada (there being no Supreme Court of Canada decision on point) there are many common law jurisdictions that have indeed held valid a marriage at common law.

There are 16 states in the United States of America that specifically acknowledge the legality of the common law marriage.[18] Even in those states that have abolished common law marriage through legislation, such states still accept the notion of common law marriage as being legal[19] outside their own jurisdiction.

The English Courts, while abolishing common law marriages in England, continue to hold valid common law marriages entered into in Scotland,[20] Singapore,[21]

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[18] W.J. O'Donnell & D.A. Jones, The Law of Marriage and Marital Alternatives, Toronto: D.C. Heath & Co., 1982, p.15.

[19] L.A. Lavarto, "Family Law - The Elements of a Common Law Marriage" (1962), 11 Drake L. Rev. 65.

[20] Dalrymple v. Dalrymple (1811), 2 HAG. CON. 54, 161 E.R. 655.

[21] Penhas v. Tan Soo Eng, [1953] A.C. 304 (P.C.).

Germany,[22] China,[23] and Italy,[24] to name but a few. Australia, applying English precedents, also hold valid common law marriages entered into in Bavaria,[25] Germany,[26] Hong Kong,[27] and the Ukraine.[28]

The provinces in Canada have only on infrequent occasions had to consider whether the concept of common law marriage applies to their respective jurisdictions,[29] with much vacilation I might add.[30] However, suffice it to state that the North West Territories has held valid a common law marriage on several occasions.[31]

It is abundantly clear, that Gampel is himself confusing the two distinctive and separate entities of the common law marriage and "living common law" when he states:[32]

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[22] Kochanski v. Kochanska, [1957] 3 ALL E.R. 142.(P.D.&A.).

[23] Wolfenden v. Wolfenden, [1946] p.61.

[24] Taczanowska v. Taczanowski, [1957] 2 ALL E.R. 563 (C.A.).

[25] Savenis v. Savenis, [1950] S.A.S.R. 309 (S.C.).

[26] Jaroszonek v. Jaroszonek, [1962] S.A.S.R. 157 (S.C.).

[27] Ng Ping On v. Ng Choy Fung Kan, [1963] N.S.W.R. 782.

[28] Kuklycz v. Kuklycz, [1972] A.L.R. 122 (VICT.S.C.).

[29] Infra, Chapter IV .

[30] See Dutch v. Dutch (1977), 1 R.F.L. (2D) 177 (Ont.CO.CT.) and Alspector v. Alspector (1957), 9 D.L.R. (2D) 679 (ONT.C.A.).

[31] See Queen v. Nan-E-Quis-A-Ka (1885), 1 TERR. L.R. 211 and Re Noah (1961), 36 W.W.R. 577 (N.W.T.TERR.Ct.).

[32] Supra, Gampel, n.16 at p.291.

> "My argument has been that the very type of relationships referred to by Pritchard as "common law marriages"; and that type of relationship referred to in s.2(c)(ii) of The Family Law Reform Act, 1976, is not and never was a "common law marriage". But here we find on one hand Pritchard saying that "common law marriages" should be abolished and on the other hand The Family Law Reform Act, 1976, saying that these non-married spouses in these non-legal marriage relationships should bear the same support obligations as married spouses in a legal marriage."

This statement is thwart with confusion. In essence, what The Family Law Reform Act, 1976,[33] in s.2.(c)(ii) did, was to create a new category for spousal support based upon "living common law" relationships. In my argument for the existence of common law marriages, it is plainly obvious, that the two entities are treated as separate and distinct. Gampel, however, persists on mixing them together, and then, as if by revelation, states Pritchard wants to abolish that which The Family Law Reform Act, 1976, seeks to create.

Logic dictates that such can be the case when two separate entities (myself and The Family Law Reform Act) are considering the two separate, distinct concepts, of common law marriage and nonmarital cohabitation. I advocated the abolishment of one of the concepts; The Family Law Reform Act created a new concept. If the essence of Gampel's commentary was that common law marriage had its origin in Cannon Law, then such is conceded. However, to argue that the common law marriage which has been held valid by courts,

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[33]Now repealed. See Family Law Act, S.O. 1986, c.4.

prior to, and since, the passage of Lord Hardwicke's Act,[34] in the face of R. v. Millis[35] decision, are nonexistent, such is utter nonsense. Semantics might well have properly referred to such marriages as "Cannon Law based-Common Law Marriages", which no doubt would have added to the confusion. Perhaps, the terminology marriages valid at common law[36] is more appropriate and more legally correct in the context of comtemporary society.

Quite apart from the difficulty surrounding the terminology and substantive meaning, there is also the problem of finding a working and acceptable definition of nonmarital cohabitation.

The term "living common law", since it is invariable confused with common law marriage, is not a good definition, based on the inaccuracy of what it purports to be. Likewise, "cohabitees" is unsatisfactory, as it could include members of an extended family of blood relatives as well as strangers. It is not only grammatically incorrect but aesthetically wanting. "Unmarried Cohabitees", also adds confusion, as it may be held to refer to "children" not of age to marry.

A whole raft of usages have emerged, from the derogatory ones, such as, "mistress", "meretricious

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[34] 1753 (U.K.), 26 GEO. 2, c.33.

[35] (1844) 10 CL. & FIN. 534, E.R. 845 (H.L.).

[36] Supra, Pritchard, n.11 at p.131.

relationship", to more formal definitions, such as "de facto spouses", "spouse equivalent", "domestic associate", "putative wife and husband", and "unmarrieds-at-law".

From the sublime to the ridiculous are such definitions as, "co-vivant", "special friend", "meaningful associate", "significant other person", "current companion", to "Lil" (short for live-in-lovers).

Parker,[3'] sums up the situation in somewhat of a humorous fashion:

> "The writer's favourite is an "ummer" which is to derive from the embarrassed resolution of the verbal dilemna by a mother introducing her daughter's cohabitant,'...this is Oliver, my daughter's um, er...'"

Needless to say, I shall approach this problem from the "back door" philosophy. Marriages sanctioned under the various Marriage Acts will be referred to as legal marriages, informal marriages recognized by the common law as common law marriages, and all other definitions that will be referred to, or used, shall apply mutatus mutandus to the definition I prefer, that of nonmarital cohabitation.

Weyrauch, as quoted by Green & Long, aptly states the problem:[3"]

> "A valid definition of common law marriage [referring to non marital cohabitation] without infinite qualifications can hardly be found. All we have are approximations which demonstrate ambiguous and vacillating notions of some more or less informal kind of marital status. Whatever hazy

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[3']Stephen Parker, Cohabitees, Chishester: Barry Rose Publishers Ltd., 1981.

[3"]Supra, Green, n.10 at p.87.

notions we have vary not only from jurisdiction to jurisiction but from case to case.".

While the distinctions are often blurred, giving rise to confusion, there are several clear cut differences. In the common law marriage, the couples hold themselves out to be married, whereas cohabitees do not[39]. In cohabitation, upon separation, if of legal capacity, the couples are free to marry other persons, opposed to common law marriage where a divorce is a prerequisite to remarriage.[40] The free association of cohabitation may take on many forms, and as a consequence, confers relatively varying degrees of societal and legal acceptance upon the couple. The common law marriage does create a definite status at law,[41] even though it may not be as socially acceptable as legal marriage. Pollock & Maitland assess the situation thoroughly when distinguishing the advantages of the informal common law marriage, that in my opinion, applies even more to nonmarital cohabitation:[42]

> "...a marriage with banns had certain legal advantages over a marriage without banns, which can only be explained below when we speak of 'putative' marriages. But still the formless, the unblessed, marriage is a marriage.... The formless interchange of words prevails over the combined force of ecclesiastical ceremony and sexual intercourse."

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[39] Id. p.162.

[40] Id. p.162.

[41] Id. p.80.

[42] Pollock & Maitland, The History of English Law, VOL.2. Cambridge: Cambridge University Press, 1968, pp.371-372.

The nonmarital relationship can therefore be considered as one step removed from the common law marriage and is discernable by either a lack of agreement to marry or the lack of capacity to marry by one or both of the parties, usually that of a subsisting marriage. Once the legal impediment has been removed a nonmarital relationship may evolve into a common law marriage, dependant upon the conduct of the parties.[13]

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[13] Supra, Pritchard, n.11 at p.131.

III. A Historical and Judicial Interpretation of the Common Law Marriage in England, Australia, and the United States of America.

The common law marriage is deeply rooted in Roman Law and more specifically, cannon law.[44] Historically, cannon law was more concerned with marriage and the common law with any relationship that concerned property rights. Consequently, ecclesiastical emphasis was not overly concerned with the formalities of marriage. Unions were readily blessed by the Church without too much conformity as to the details.[45]

The finding of a "marriage" would automatically legitimize children of a union and therefore was in the best interest of society.[46] The Church's vested interest was in saving souls, so marriage was made easy. The status of marriage was conferred even where one party was still married to someone else,[47] for it was "better to marry than to burn".[48] As Pollock & Maitland put it:[49]

> "Reckless of mundane consequences, the church, while she treated marriage as a formless contract, multiplied impediments which made the formation of a valid marriage a matter of chance."

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[44] Supra, Pollock & Maitland, n.42 at p.367.

[45] Id. p.380.

[46] Supra, O'Donnell & Jones, n.18.

[47] Supra, Pollock & Maitland, n.42 at p.380.

[48] Id. p.385.

[49] Id. p.386.

This two-purposed approach, that is, the common law's insistence on finding of a valid marriage to ensure protection of property rights, and the Church's need to legitimize unions, caused much confusion of which modern day society is still plagued.[50] One instance which is clearly illustrative of such duality of purpose and the confusion it wrought, was the case of 1254, William de Cardunsville, deceased.[51] In that case the court chose to recognize an unsolemnized marriage over a solemnized one, and rendered its decision without reference to the ecclesiastical "Court Christian". It is therefore an analagous issue as to whether such decision was rendered on the issue of proprietory interests, or a right involving marriage.

In order to alter (and perhaps bring together) such diversities, the Tametsi Decree of the Council of Trent (1563), while affirming that all decisions made in the past had been correct, required that in the future, the presence of a priest and two witnesses was essential to the formation of a valid marriage.[52]

Subsequent to this edict, many statutes were passed which eroded the jurisdiction of the cannon law, until finally, Lord Hardwicke's Marriage Act,[53] 1753, completely

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[50]See Chapter IV.

[51]For a discussion on the case, see Pollock & Maitland, n.42 at p.380.

[52]See Louis v. Esslinger (1981), 121 D.L.R. (3D) 17 (B.C.S.C.) at p.34 for an excellent recapitulation of the case law.

[53]Supra, n.34.

abrogated the Church's authority in the abolishment of the Ecclesiastical Courts. The Act was primarily enacted to put a stop to clandestine marriages, the underlying reasoning of which was to ensure control over property rights, the most important issue in feudal England. The rules contained in the Act were mandatory for the establishment of a legal marriage recognized by law, and its impact was felt when the House of Lords conclusively affirmed the abolishment of common law marriage in R. v. Millis.[54] The Act was repealed in 1823, and in its wake, the several Marriage Acts did not do away with the requirement of solemnization of the marriage.

While it is absolutely clear that the common law marriage in England was abolished by Lord Hardwicke's Act and the decision in R. v. Millis, it is, however, still unclear as to what effect both events had on the law in Canada. The Act specifically confines its application to England, and while the decision in the Millis case may still be good law in Canada the implications are ambiguous. What is the interpretation on its application to Canada? That is, just how binding is an English decision upon Canada when the statute specifically restricts its jurisdicion to English law within the confines of England? This is the subject matter of Chapter III of this thesis and was introduced at this juncture merely to facilitate discussion on the

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[53](cont'd)
[54]Supra, n.35.

reaction of the courts in other common law jurisdictions that have their base in the English common law.

It is reasonably clear that the effect of Lord Hardwicke's Act and the Millis decision was not accepted into the common law of the United States of America. In the case of Fenton v. Reed[55] it was held that a contract of marriage made per verba de praesenti was a valid marriage notwithstanding the absence of formal solemnization. Although most of the states have abolished common law marriages through legislation, some 16 states continue to hold valid, common law marriages.[56]

Green & Long, are of the opinion that common law marriages were accepted into the United States of America because of colonial harsh existence found in difficulties of travel, scarcity of officals to solemnize marriages but mainly because the population was sparsely scattered.[57] Kirkpatrick agreed, and added, that it also served a useful societal purpose in the legitimizing of relationships.[58] One may also gleen a covert reason for noncompliance to Lord Hardwicke's Act in Kirkpatrick's subtle observation:[59]

> "This Act was still in force at the time of the American Revolution and was still in force in

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[55]4 Johns. R.52 (1809).

[56]Supra, O'Donnell & Jones, n.18 at p.15.

[57]Supra, Green & Long, n.10 at pp.82-86.

[58]Graham Kirkpatrick, "Common-Law Marriages: Their Common Law Basis and Present Need" (1960), 6 St. Louis L.J. 30.

[59]Id. p.35.

England in 1809,when the New York Court decided Fenton v. Reed."

Since the United States of America and Canada are geographically bound, and further, it usually being readily accepted that Canada is somewhat harsher in inclement weather, it will be interesting to consider the ramifications that resulted in the somewhat inconsistent decisions emanating from the Canadian Courts, the subject matter of the next chapter.

It is an established principal of law that the formalities in the establishment of a valid marriage are governed by the lex loci celebrationis,[10] in other words, by the law of the jurisdiction in which it was celebrated. However, as a result of Lord Hardwicke's Act, as it applies to other countries, and the ramifications of the Millis decision, there has been conflicting case law. The courts have seen fit to apply the doctrine of lex domicilii[11] and lex fori[12] in cases where it is impossible to comply with the local law,[13] or alternatively, where there has been no submission to the lex loci celebrationis.[14]

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[10] Supra, Davies, n.14 at p.16.

[11] Savenis v. Savenis, [1950] S.A.S.R. 309 (S.C.); Jaroszonek v. Jaroszonek, [1962] S.A.S.R. 157 (S.C.); Kochanski v. Kochanska, [1957] 3 ALL E.R. 142. (P.D.&A.); Preston v. Preston, [1962] 3 ALL E.R. 1057 affirmed [1963] 2 All E.R. 405 (C.A.).

[12] Supra, n.28.

[13] Savenis v. Savenis, [1950] S.A.S.R. 309 (S.C.) and Kuklycz v. Kuklycz, [1972] A.L.R. 122 (VICT.S.C.).

[14] Taczanowska v. Taczanowski, [1957] 2 ALL E.R. 563 (C.A.) and Lazarewicz v. Lazarewicz, [1962] 2 ALL E.R. 5 (P.D.&A.).

In the earlier cases, where the lex loci was not adhered to, a marriage was held to be null and void[14] although the strong presumption of marriage seems to be used to sustain validity both in old,[15] as well as in relatively recent cases.[16] This is especially true where it would have been recognized as valid "in all civilized countries,"[17] or where the parties lived in a "separate community,"[18] the latter two instances invoking application of the lex domicilii doctrine.

Two English decisions clearly restricting Lord Hardwicke's Act and the Millis decision to the confines of England, found valid marriage ceremonies entered into in a colony,[19] and a foreign country.[20]

Where there is compliance to local law[21] or conversely, where, it is held that the parties did not purposely avail themselves of the local law,[22] or where there is insufficient proof[23] of the marriage, such will render the

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[14](cont'd)
[15]Scrimshire v. Scrimshire (1752), 161 E.R. 782.

[16]Supra, n.20.

[17]Collett v. Collett, [1967] 2 ALL E.R. 426 (P.D.&A.).

[18]Savenis v. Savenis, [1950] S.A.S.R. 309 (S.C.).

[19]Kochanski v. Kochanska, [1957] 3 ALL E.R. 142 (P.D.&A.).

[20]Supra, n.21.

[21]Supra, n.23.

[22]Persian v. Persian, [1971] A.L.R. 578 (N.S.W.S.C.).

[23]Lazarewicz v. Lazarewicz, [1962] 2 ALL E.R. 5 (P.D.&A.).

[24]Milder v. Milder, [1959] V.R. 95.

marriage valid or invalid respectively. Likewise, a marriage not falling within the defintion of "marriage" as enunciated in the Hyde v. Hyde decision will be held void,[75] as was a marriage "of convenience",[76] and a "transsexual" marriage.[77]

Taczanowska v. Taczanowski[78] was an extreme case in which noncompliance to the lex loci was found and where the lex domicilii could not be applied. In that case the English Court of Appeal decided the case on the lex fori principle. Much criticized as "having gone too far" both by judges[79] and legal scholars,[80] it does stand for the proposition that the common law marriage need not comply with the lex loci, and that it is unnecessary to look at the lex domicilii.

Marriages purported to have been celebrated during World War II appear to have created the greatest difficulty for the courts, with only shades of differences in the factual situations giving rise to questionable inconsistencies. In Lazarewicz v. Lazarewicz,[81] two Polish

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[76](cont'd)
[75]Supra, n.27.

[76]Dukov v. Dukov, [1970] A.L.R. 650 (QUE.S.C.).

[77]Corbett v. Corbett (otherwise Ashley), [1970] 2 ALL E.R. 33 (P.D.&A.).

[78]Supra, n.24.

[79]Preston v. Preston, [1963] 2 ALL E.R. 405 (C.A.) at p.411.

[80]Dicey & Morris, The Conflict of Laws, 10TH. ED. VOL.1. London: Stevens & Sons, 1980, pp.272-273. See opposing view of Davies,"...Taczanowski should not be confined so as to preclude relief being given in equally worthy cases." p.19.

[81][1962] 2 ALL E.R. 5 (P.D.&A.)

nationals went through a ceremony before a Roman Catholic priest in Italy, and such was held invalid, while in a similar factual situation in Germany, a marriage was proven to be valid.[42] Preston v. Preston,[43] which was decided by the same English Court as in the Lazarewicz decision, only two months before, held a marriage valid on the grounds the marriage conformed to the law of domicile of the petitioner.

In Merker v. Merker[44] a decision of the same court only one day before the Preston case, applied the doctrine of lex fori in a similar factual situation as found in the Lazarewicz decision, and held the marriage valid. The only factual difference between Merker and the Lazarewicz opposing decision, as I view it, appears to be dependent on the country in which the Polish nationals were faithfully serving their country. The contrast being that Germany was an occupied territory while Italy was not! Ironically, an Australian court in Jaroszonek v. Jaroszonek,[45] again in a similar factual situation, found a valid marriage. In light of these decisions it would seem that the Lazarewiczs not only served in the wrong country during World War II but they further emigrated to the wrong country upon its

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[41](cont'd)
[42]Supra, n.22.

[43][1962] 3 ALL E.R. 1057 affirmed [1963] 2 ALL E.R. 405 (C.A.).

[44][1962] 3 ALL E.R. 928 (P.D.&A.).

[45]Supra, n.26. See also, Kuklycz v. Kuklycz, [1972] A.L.R. 122 (VICT.S.C.).

cessation!

Lepstein, cautions against the application of the lex fori doctrine in the finding of a valid common law marriage.''

> "Where the formal validity of a marriage abroad is concerned, the reference to the lex loci celebrationis is imperative, since the formal validity of a marriage must be capable of proof by means of documentary evidence, which can only be supplied by the authorities on the spot. Except in the limited circumstances now recognized by the English courts, parties marrying abroad should not be allowed to avail themselves ex post of the form of a common law marriage, if the marriage is invalid in form according to the lex loci celebrationis, since to hold otherwise will permit one of the parties, at his will, to validate the marriage with retroactive effect by presenting a petition in England, when a court in the country of celebration will clearly declare the marriage to be invalid."

In summary, therefore, it would appear that in the United States of America, the majority of the jurisdictions have abolished common law marriages, while most states still acknowledge its existence following the rule enunciated in Fenton v. Reed.

The position of the English courts appears to be inconsistent, in that, while abolishing common law marriages in England, it has widened the concept in cases "abroad", Australia being the apparent forerunner.

''K. Lipstein, "Marriage-Form-Lex Loci Celebrationis-Invalidity-Common Law Marriage-Sphere of Application" (1963), CAMB. L.J. 53, p.53.

IV. Arguments For and Against the Existence of the Common Law Marriage in Canada.

A. Interpretation of the Provincial Marriage Acts.

All of the provisions of the provincial Marriage Acts [1] provide a prescribed format and procedures for the solemnizing of marriages, and while there are slight differences in the wording, the Alberta Marriage Act, will be referred to throughout this section mutatus mutandus with the other Acts. Specific reference to the other provincial statutes will be made where it is either necessary to make relevant distinctions, or where the case under consideration so requires.

In Alberta, the Marriage Act, R.S.A. 1980, c.M-6, and amendments thereto, states:

> s.3. No person may solemnize a marriage except
> (a) a clergyman registered under this Act, or
> (b) a marriage commissioner appointed under this Act.

It further states:

> s.23(1) A marriage is not invalidated by reason only of a contravention of or non compliance with this Act
> (a) by the person who solemnized the marriage, or

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[1] [ONT.] R.S.O. 1980, c.256.
[P.E.I.] R.S.P.E.I. 1974, c.M-5.
[N.B.] R.S.N.B. 1973, c.M-3.
[NFLD] Solemnization of Marriage Act, 1974, (NFLD.) No.81.
[N.S.] Solemnization of Marriage Act, 1967, c.287.
[ALTA.] R.S.A. 1980, c.M-6.
[B.C.] R.S.B.C. 1979, c.251.
[SASK.] R.S.S. 1978, c.M-4.
[MAN.] R.S.M. 1970, c.M-50.
[N.W.T.] Marriage Ordinance, R.O.N.W.T. 1974, c.M-5.
[YUKON] Marriage Ordinance, R.O.Y.T. 1971, c.M-3.

(b) by the person who issued the licence for the marriage.

The operative invalidating part of the Act appears to be section 21(1) which reads:

> 21(1) The consents required under section 18 and the medical certificate required under section 16 and 19 are a condition precedent to the valid marriage of a person under 18 years of age, and where a form of marriage is solemnized between persons, either of whom is under 18 years of age without a required consent or medical certificate is void unless
> (a) carnal intercourse has taken place between the parties prior to the ceremony, or
> (b) the marriage has been consumated, or
> (c) the parties have after the ceremony, cohabitated and lived together as man and wife.

It would seem clear that section 3 and section 23 effectively cancel each other out when deciding whether a "marriage" under the Act is invalid or not. However, when it comes to interpretation by the courts, clarity often becomes a muddy pond. In Petschl v. Buchi** the Alberta Supreme Court referring to similar sections in a former Act, ruled a marriage invalid where a man and woman obtained a licence from a jewelry store, which was legally empowered to issue marriage licences, and where it was alleged the couple went through a form of ceremony performed by the proprietor. It was clearly evident that the judge felt that getting married in a jewelry store was preposterous, even though both parties were foreigners and believed themselves to be married. It seems to me, that this is the type of situation that section 23(1) seeks to correct, and make valid a marriage that does not comply with section 3.

**[1926] 3 W.W.R. 598 (ALTA.S.C.).

Notwithstanding such quirks at law, the question of solemnization is not relevant to common law marriage which does not require solemnizing to constitute a valid marriage. Quite the contrary, a declaration of the intent to marry followed by consumation and the living together as husband and wife is what effectively constitutes a legal common law marriage.

Section 21 purports to require "consents" and a "medical certificate" as conditions precedent to the making of a valid marriage, and which further states that unless the conditions precedent are met, the "marriage" is "void." This is further restated in section 21(2). Unless the conditions precedent are met, "that a valid marriage was not effected." Both statements are of course subject to subsections (a), (b), and (c) of section 21(1).

After careful reading of such subsections, in light of modern contempory society, the writer finds it hard to conceive of any situation that would fall outside of these subsections, whether pursuant to a Marriage Act or at common law. Any relationship that does fall outside of such subsections, would, in the opinion of the writer, not be worthy of validation as a marriage.

Like certain judges, legal scholars also argue that the noncompliance with such provisions will result in a nullity, unless validated by the curative sections. Friend is of the opinion that the formalities must be complied with in order to establish a valid marriage and goes even further when he

states, an express voiding section is not required to render invalid common law marriages:[9]

> "It is pointless to require that an authorized person perform the marriage ceremony and that a licence be issued if parties can contract a valid marriage without these formalities. "

To this point, I am somewhat in agreement, even though Friend did pass lightly over two decisions that held otherwise.[10] His position becomes less credible when he argues that the sections when read in conjunction with one another, will be sufficient to invalidate a common law marriage. He states:[11]

> "By looking for an express voiding section, the curative sections are ignored as meaningless as in Peppiatt v. Peppiatt...or misinterpreted, as in Clause v. Clause...to read the curative sections and the directory sections together does not depart from requiring the legislature to express their voiding intention in 'plain and unequivocal language'."

He further states:[12]

> "A closer inspection of the Marriage Act [R.S.O. 1950, c.222] will reveal that instead of validating a "common law marriage" section 44 is the sole section in the Act preventing such a marriage from being valid when coupled with the directive sections 4(1) and 21(1), it is the only section which renders a marriage void for noncompliance with formalities."

For greater clarity, the sections Friend refers to are recited as follows:

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[9]D.G. Friend, "'Common Law' Marriage in Ontario: The Alspector Case" (1958), 16 FAC. L. REV. U. of Toronto 80, p.92.

[10]Peppiatt v. Peppiatt (1916), 30 D.L.R. 1 (ONT.C.A.) and Clause v. Clause, [1956] O.W.N. 449 (H.C.).

[11]Id. p.90.

[12]Id. p.92.

s.44 If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabitated as man and wife, such marriage shall be deemed a valid marriage, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage, and notwithstanding the absence of or any irregularity or insufficiency in the publication of banns or the issue of a licence or special permit.

s.4(1) No marriage may be solemnized except under the authority of a license, special permit, or publication of banns.

s.21(1) No person shall solemnize a marriage unlesss he is a judge or a magistrate or is registered under this section as a person authorized to solemnize marriages.

Bryden, upon considering the New Brunswick Act,[3] feels that the curative sections would be unnecessary if common law marriages were intended to be recognized as valid and looks at the "intention" of the Act. After finding no such intention, he concludes:[4]

"...with the result that the only marriages performed in accordance with, or subsequently validated by the terms of the Act, are valid in New Brunswick."

Hahlo, arguing against such a conclusion, states:[5]

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[3]Marriage Act, R.S.N. 1952, c.139.

[4]Roderick M. Bryden, "Domestic Relations-Common Law Marriage-Application of English Law to Colony-New Brunswick Marriage Act, R.S.N. 1952, c.139-Necessary Intention" (1964), 14 U.N.B.L.J. 60.

[5]H. Hahlo, Nullity of Marriage in Canada with a Sideways Glance at Concubinage and its Legal Consequences, Toronto: Butterworths, 1979, p.20 footnote 114.

> "It is arguable that the wording of s.23 of the Alberta Marriage Act, R.S.A. 1970, c.226 is sufficiently wide to allow the courts to declare even a marriage in "common-law" form to have been lawfully solemnized."

In the respectful opinion of the writer, all three authors have completely failed to understand the nature and essence of the common law marriage. The reasoning of Friend, in attempting to interpret the Marriage Act by reading sections in conjunction with each other, results in a negative inference and not an express provision. Bryden's "intention" argument presupposes that if the legislature had intended to allow parties to avail themselves of statutory confirmation of their common law marriage, it would have made such available in the curative sections, which it his opinion, the statute did not. Hahlo, on the other hand, while disagreeing with the position taken by Bryden, still refers to solemnization as being needed in order to validate a common law marriage.

Stated in plain and unequivocal language, a common law marriage is a "marriage" which is valid by the common law. It therefore needs no solemnization, nor does it need a validating statute to render it valid and effective. It is true that the legislative process is competent to alter the common law, but, as Dr. Lushington stated in the

leading English case of Catterall v. Sweetman,'' the words in a Marriage Act must expressly create a nullity; an inference of a nullity will not suffice to invalidate a marriage. In Collett v. Collett, Ormrod, J. summerized the English position as follows:''

> "In my judgment, the principle which emerges from the corpus of legislation regulating the formation of marriages in England and from the reported cases arising therefrom is that, if a ceremony of marriage has actually taken place which, as a ceremony, would be sufficient to constitute a valid marriage, the courts will hold the marriage valid unless constrained by express statutory enactment to hold otherwise."

It is therefore submitted that it is more reasonable to assume that if the legislature had intended to render invalid common law marriages, it could have easily done so in one brief sentence rather that subject proponents of such arguments to such tortuous reasonings. I am in complete agreement with Cherniak and Flen when they succinctly stated:''

> "In our view the Marriage Act constitutes a set of administrative directives only. It is not mandatory in nature and does not invalidate any marriage not complying with its solemnization requisites.... Accordingly, the Marriage Act is simply

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''(1845) 1 ROB. ECCL. 304, 163 E.R. 1047.

''[1967] 2 ALL E.R. 426 (P.D.&A.) at p.431.

''Laurie Cherniak & Cy Flen, "Common Law Marriages in Manitoba" (1964), 6 MAN. L.J. 85 at pp.90-91.

> irrelevant to the question of whether marriages at common law can be considered valid if contracted between two parties with full capacity. The common law marriage exists entirely outside the Act as an alternative means of marrying."

B. The Constitutional Issue

It can be further argued that even if there were words of express invalidation of common law marriage to be found in provincial Marriage Acts, such would be ultra vires. In A.G. Alta and Neilson v. Underwood,'' the Supreme Court of Canada held that the provincial legislatures were competent to legislate matters relating to solemnization, as such were steps or preliminaries to marriage. This would seem reasonably clear since Marriage (and Divorce) fall within the sole jurisdiction of the Federal Government, on an interpretation of sections 91 and 92 of the British North America Act, 1867. Such was proclaimed in the ratio decidendi of the decision of the Privy Council in Re Marriage Legislation in Canada'[00]

The Ontario Court of Appeal in Peppiatt v. Peppiatt'[0'] following the Re Marriage Legislation in Canada decision, stated, that in order for a Marriage Act to invalidate a marriage, such terminology would have to be in "plain and unequivocal language."'[02] Having decided the case on this

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''[1934] S.C.R. 635.

'[00][1912] A.C. 880 (P.C.).

'[0'](1916) 30 D.L.R. 1 (ONT.C.A.).

'[02]Id. p.13.

issue, Meredith, C.J.O. in obiter dictum stated:[103]

> "I should have thought, apart from authority, that the provision requiring consent is ultra vires a Provincial Legislature. It is in effect a restriction upon the right of a person under the age of 18 years to marry, and therefore a restriction upon personal capacity to contract marriage; and I should have thought that the provision, therefore, deals with a matter which does not fall within sec. 92(12) as being part of what is included in 'solemnization of marriage', but is one as to which the Parliament of Canada alone has the authority to legislate."

Following this decision, the legislature amended the relevant section to provide that consent, "shall be deemed to be an absolutely essential condition" to a valid marriage. A subsequent decision,[104] followed the pronouncement, and found a marriage a nullity. A further revision to the Act, took place in 1927,[105] which included a curative section.

In the Alspector v. Alspector[106] case following the Clause v. Clause decision, it was held that the nonissuance of a marriage licence was not a bar to a valid marriage where the parties had, in good faith, gone through a form of ceremony with the intention to marry. The court observed:[107]

> "I cannot conceive a case in which if both of the parties acted in good faith one of them could be

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[103](cont'd)
[103]Id. p.436.

[104]Stewart v. Stewart, [1925] 1 D.L.R. (ONT.S.C.).

[105]Marriage Act, R.S.O. 1927, c.181.

[106](1957) 7 D.L.R. (2D) 203, affirmed (1957), 9 D.L.R. (2D) 679 (ONT.C.A.).

[107]Id. p.687.

> held not to have intended the marriage ceremony to be in compliance with the law of the Province, and therefore a nullity."

The court echoed the words in the Clause v. Clause when this former case came ever so close to saying, that Ontario would recognize an informal common law marriage:[108]

> "In fact, s.44 of the present Act comes strikingly close to validating a 'common law marriage' where parties cohabit after the ceremony."

In British Columbia, the Court of Appeal, has taken the juxtaposed position in Gilham (Steele) v. Steele[109] in declaring:[110]

> "It was therefore competent for the legislature of British Columbia to enact conditions as to solemnization of marriage and to provide that failure to observe such conditions would render de facto marriage null and void."

In Alberta, the trend is reasonably clear, although there are no decided cases on point. In Henderson (Breen) v. Breen,[111] the Alberta Court of Appeal, in obiter dictum, stated that the consent provisions would be ultra vires the provincial legislature, although lack of solemnization was held to be fatal.[112] Egbert, J. in interpreting section 24 of Solemnization of Marriage Act[113] in Hobson v. Gray,

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[108] Supra, n.90 at p.455.

[109] [1953] 2 D.L.R. 89 (B.C.C.A.) reversing 7 W.W.R. (N.S.) 302 (S.C.).

[110] Id. pp.65-66.

[111] [1923] 2. W.W.R. 480, affirmed [1923] 3 D.L.R. 600 (ALTA.C.A.).

[112] Supra, n.88.

[113] R.S.A. 1955, c.319.

stated:'''

> "In my view the section was intentionally so worded because it was not intended to affect the capacity of anyone to marry, but was intended to relate only to those matters which, in the words of the Supreme Court of Canada in the Underwood case [supra.], are steps or preliminaries leading to marriage."
>
> "Accordingly the parties to this action were capable of contracting a valid marriage unless some change has been effected by competent legislation. There is no suggestion that there has been any Dominion legislation affecting their capacity to marry. If sec.24 of the provincial statute purports to affect that capacity then it is clearly ultra vires of the provincial legislation." [The emphasis is mine.]

The issue of whether a legislature has the power to invalidate a common law marriage came before the court in Re Noah,'''' in which the court had to decide whether two Eskimo people could enter into a commmon law marriage notwithstanding the provisions of The Marriage Ordinance'''

Unfortunately, the learned judge either decided to side-step the issue, or alternatively did not understand the import of the issue. In any event, the decision has not only clouded the status of the law but may have created a new class of "custom" marriage, when it was held that the ordinance had not abolished the Eskimo marriage custom.

This decision, in my opinion, is rightly criticized''' as adding more confusion to an already complex issue. As

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'''(1958) 25 W.W.R. 82 (ALTA.) at pp.87-88.

''''(1961) 36 W.W.R. 557 (N.W.T.TERR.CT.).

'''R.O.N.W.T. 1956, c.14.

'''"Eskimo Native Marriage-Common Law Marriage-Marriage Ordinance-Intestate Succession Ordinance" (1962), 2 ALTA. L. Rev. at p.121.

pointed out by myself,[118] and Fodden,[119] such confusion is allowed to persist because of the failure of the Federal Government to legislate explicit criteria for valid marriages.

C. Status of the Common Law Marriage in Canada.

It is reasonably apparent that common law marriages existed in England prior to 1753, although there are opposing views.[120] This position of affirmation as to the state of the law has been postulated by leading authorities in England,[121] America,[122] and Canada,[123] notwithstanding Lord Chief Justice Tindal's statement to the contrary in the Millis decision.[124]

Upon enactment of Lord Hardwicke's Act, followed by the Millis decision, it is unquestionably correct that common law marriages have been abolished in England. It is also clear that the legal effect created by the statute, and confirmed by the common law, was not accepted into the United States of America.

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[118] Supra, n.11 at p.152.

[119] S. Fodden, Canadian Family Law, Cases and Materials, Toronto: Butterworths, 1977, p.2-2.

[120] Supra, n.20 and n.65.

[121] Supra, Dicey & Morris, n.80 at p.272.

[122] J.E. Semonche, "Common Law Marriage in North Carolina: A Study in Legal History" (1965), 9 AMER. J. LEGAL HIST. 320.

[123] Supra, Davies, 14 at p.20.

[124] Supra, n.35.

The legal position in Australia appears to be in a state of considerable vacillation,[125] and in the opinion of the writer, is an apparent struggle between the courts as to whether the principles enunciated in the Taczanowska[126] decision shoud be accepted into Australian law. The application of the lex fori doctrine and the finding that a common law marriage does not require that the lex loci celebrationis to be complied with, coupled together with the further notion that it is also unnecessary to even consider the lex domicilii; such is a radical extension of the original intent of English law in the abolishment of the common law marriage in England.

In Canada, some two hundred and thirty years after the enactment of Lord Hardwicke's Marriage Act, the debate still continues as to whether a common law marriage can be validly contracted. Canada inherited its original common law from England prior to departure from British rule, and despite whatever common law existed prior to the colonists settling in Canada,[127] it is apparent that the law of England was transported with the settlers. Perhaps more correctly

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[125]See Savenis v. Savenis, [1950] S.A.S.R. 309 (S.C.); Maksymec v. Maksymec (1954), 72 W.N. 552 (N.S.W.); Jaroszonek v. Jaroszonek, [1962] S.A.S.R. 157 (S.C.); Kuklycz v. Kuklycz, [1972] A.L.R. 122 (VICT.S.W.); contrasted with: Milder v. Milder, [1959] V.R. 95 and Ng Ping On v. Ng Choy Fung Kan, [1963] N.S.W.R. 782 See also, conflicting decisions and reasoning in Dukov v. Dukov, [1970] A.L.R. 650 (QUE.S.C.) and Persian v. Persian, [1971] A.L.R. 578 (N.S.W.S.C.).

[126]Supra, n.24.

[127]G.W. Baldwin, "Non Illegitimos" (1972), 30 ADVOCATE 303.

stated, the [illegible]ists brought only so much of the law of England with them that was applicable to their situation and condition.'[12] The problem with such "application" of English law is that it is somewhat subjective in nature and is further complicated by the erroneous part in the Millis decision. In other words, on a subjective level, did the settlers leave the faulty parts of the common law on English soil and bring only "good law" to Canada, or, on an objective level, can Canadian courts overrule a decision of the House of Lords which was subsequently upheld by the English courts?

The matter is further complicated by the fact that Lord Hardwicke's Act, as interpreted in the Millis decision, expressly did not do away with the concept of common law marriages "abroad". The consequences of such subjective and/or objective analysis, is to say the least, confused. Is Canada "abroad" when it uses English common law on Canadian soil?

One of the first decisions to contemplate the application of the English law to Canada was Doe d. Breakey v. Breakey.'[13] In this case, a defrocked Irish Presbyterian minister conducted a ceremony of marriage at an Inn, without the issuance of a licence and where the banns had not been published. Further the ceremony was conducted under the most

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'[12]G.M. Keyes, "The Validity of the Common Law Marriage in Ontario" (1958), 1 OSGOODE HALL L.S.J. 58.

'[13](1846) 2 U.C.Q.B. 349 (C.A.).

suspect of circumstances:[130]

> "...whose performance of the ceremony it was contended was irregular and illegal, as he had been degraded from his pastoral charge under such circumstances which render it doubtful whether any marriage ceremony performed by him would be considered valid."

In reasoning for the likelihood of finding of a valid marriage, after the facts disclosed cohabitation for 30 years, the learned judge, after stating that the "strong presumption" of marriage could only be rebutted by "strong proof" ordered a new trial thereby rendering such rhetoric as obiter dictum and the fate of the common law marriage to future courts of law.

It is certain that where there is an impossibility to apply the principles as laid down in the Millis decision then a valid common law marriage can be contracted.[131] In the criminal case relating to admissibility of evidence, an "Indian" marriage in Queen v. Nan-E-Quis-A-Ka,[132] the court was of the opinion that the common law doctrine of husband and wife privilege was applicable, to what appears to be analagous to a common law marriage, among Indian peoples. In a decision that worked in the Crown's favour, in finding the accused guilty, one has to suspect its relevance in contemporary society. As the learned judge stated:[133]

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[130]Id. pp.349-350.

[131]Supra, n.35.

[132](1885) 1 TERR. L.R. 211.

[133]Id. p.215.

> "I am satisfied that however that these laws are not applicable to the Territories quoed the Indians. The Indians are for the most part unchristianized; they yet adhere to their own peculiar marriage customs and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriages is applicable to them."

This, "impossibility to conform" to the Millis doctrine, did not extend to a mixed marriage between a white man and an Indian woman, even when the ceremony conformed to Indian custom. The judge stated in Re Sheran,[134] that an exception to the Millis decision would be where the place of ceremony was considered to be a "barbarous country." Holding that the North West Territories in 1906 was not such a place, a marriage per verba de presenti, was struck down.

In Re Noah, Sissons, J.T.C., said:[135]

> "...Lord Hardwicke's Act, 1753...which however, has a specific paragraph making it effective and binding only in England, and it had no extra-territorial effect."

However, such, in law, is hardly ever true, for the learned judge then went on to decide the case on the basis of an "Eskimo Custom Marriage." Even legal scholars, who obviously wished otherwise, have tried to reconstruct the ratio decidendi without much success. As O'Brien, in the opinion of the writer, attempted to do:[136]

> "...the Eskimo marriage conformed to a marriage

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[134](1906) TERR. L.R. 83.

[135](1961) 36 W.W.R. 557 (N.W.T.TERR.C.T.) at p.594.

[136]Clifton O'Brien, "Case Comment: Eskimo Native Marriage-Common Law Marriage-Marriage Ordinance-Intestate Succession Ordinance" (1962), 2 ALTA. L. REV. 121.

> recognized as valid at common law, and the Marriage Ordinance of Northwest Territories did not invalidate such a marriage."

There being no decided Canadian cases on point,[37] the writer could find only one English decision that considered common law marriage specifically. In Wolfenden v. Wolfenden[38] a couple went through a ceremony at a Scottish Mission Church in China, where no banns had been published, no licence issued and where no authorized person had performed the ceremony pursuant to the Foreign Marriage Act. The court held that a "colony" and a "foreign country", for the purpose of "marriage", was indistinguishable. In finding a valid common law marriage, the court reasoned that although English law was to be administered in "the district," the whole of the English law did not necessarily apply.

The notion of a common law marriage was rejected outright in Ex Parte Cote,[39] although the writer contends fallaciously and on narrow grounds. The learned judge stated that the Canada Evidence Act[40] did not extend to a common

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[37] J.G. Castel, Canadian Conflict of Laws, VOL.2. Toronto: Butterworths, 1977, p.84.

[38] Supra, n.23.

[39] (1971) 22 D.L.R. (3D) 353 (SASK.C.A).
Note that this decision distinguished R. v. Williams (1921), 37 C.C.C. 126 (B.C.S.C.) which stated an "Indian Custom Marriage" allowed for "privilege" to extend to a "wife" under the Canadian Evidence Act, but declared the "marriage under consideration was not an Indian "custom marriage".

[40] 1952, c.307, s.4(3).

law spouse.'[41]

> "To constitute a marriage valid at common law, that is, in the absence of a statute otherwise specifically providing, it is not necessary that it should be solemnized in any particular rite or ceremony [the emphasis is mine]."

It is respectfully submitted that such reasoning is faulty as it reverses the onus to prove a valid common law marriage. On the basis of case law, it is apparently clear that to invalidate a common law marriage, a Marriage Act must expressly prohibit such a concept. Apart from the fact that such a provision may be ultra vires provincial legislation, the court in Ex Parte Cote, did not refer to the Millis decision at all,'[42] thereby rendering the decision irrelevant to the point of law under consideration.

Likewise, the earlier decision of R. v. Coffin is also irrelevant, as such case was decided on the basis that a "cohabitee" was not a privileged person under the Canada Evidence Act, making no reference to the common law marriage.

It can therefore be seen, that the issue as to the application of Lord Hardwicke's Act, the Millis decision, and the transportation of English law into Canada, is somewhat obscure. This state of confusion was acknowledged in the Manitoba Court of Appeal in Blanchett v. Hansell, which did very little to remedy the situation when it

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'[41]Id. Ex Parte Cote, n.139 at p.366.

'[42]Supra, Cherniak & Flen, n.98 at p.99.

stated:'[43]

> "The English view as laid down in Reg. v. Millis...is more rigid than the view generally held in most of the United States and Canada. But whatever else the requirements of a "common law marriage" anywhere were, two essentials had to be present (1) legal capacity to marry, and (2) agreement to marry..."

Added to this state of confusion is the contemplated projection of what effect the English and Australian decisions prior to, and post, the Taczanowska v. Taczanowksi'[44] decision, will have on the Canadian courts in the future.

In Penhas v. Tan Soo Eng,'[45] prior to Taczanowska, the courts wrestled with the two opposing views emanating from Berthiaume v. Dastous,'[46] and Wolfenden v. Wolfenden.'[47] The Berthiaume case, although obiter dictum, stood for the proposition that if a "marriage" was not legal in the lex loci celebrationis, "then it is no marriage anywhere".'[48] Opposed to such reasoning was the Wolfenden decision where it was decided that the extra territorial rights exception, as specified in Lord Hardwicke's Act and the Millis decision, extended the concept to include "foreign

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'[43][1943] 3 W.W.R. 275 (MAN.K.B.), affirmed [1944] 1 D.L.R. 799 (MAN.C.A.) at p.280.

'[44]Supra, n.24.

'[45]Supra, n.21.

'[46][1930] A.C. 79 (P.C.).

'[47]Supra, n.23.

'[48]Supra, n.146 at p.83.

countries". In approving of Wolfenden the Privy Council in the Penhas case ignored the question of submissions to the lex loci celebrationis doctrine when the court stated:[149]

> "...in a country such as Singapore, where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to affect a marriage."

With the exception of the Lazarewicz[150] case the English courts subsequent to the Taczanowska decision in cases involving marriages entered into during World War II, have applied the lex domicilii doctrine where the lex loci was not complied with.[151] In this category referred to by one learned writer as, "No submission to local law",[152] it is apparent that the couples refused to adhere to either the German or Italian law, when they went through the marriage ceremony. Consequently, under such circumstances, the courts have relaxed the lex loci rule[153] and applied the lex domicilii doctrine and following the Taczanowska decision have even applied the lex fori as in Merker v. Merker.[154] As

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[149]Supra, n.21 at p.319.

[150]Supra, n.64.

[151]Supra, n.22 and n.61.

[152]Supra, Davies, n.14 at p.17.

[153]Joseph Jackson, The Formation and Annulment of Marriage, 2nd Ed., London: Butterworths, 1969. Jackson, is of the opinion that where the lex loci is rejected then no formal obstacles remain in the finding of a common law marriage, at p.225.

[154]Supra, n.84.

Webb aptly puts it:[155]

> "He was able to hold, following in particular Taczanowska (orse. Roth) v. Taczanowski and Kochanski v. Kochanska that the marriage, despite its formal invalidity by German law, was a valid common law marriage, English law being applicable as the lex fori even though the parties were entirely unconnected with English law at the time of the marriage. This is, of course, perfectly unobjectionable since it is beyond doubt that the parties were members of, and, indeed, within the lines of, an army of occupation - so long as one has no objection to the extention to the concept of the common law marriage that these two authorities have warranted."

The issue of whether or not a valid common law marriage can be contracted in Canada is dependent upon several factors. Clearly if Lord Hardwicke's Act was brought into Canada, and Canadian territory was equated to English soil, then the rule in Millis would apply.[156] Consequently common law marriages in Canada, even if they existed prior to such authority, would be abolished.

It is therefore critical to decide whether England and Canada are "one" for the purpose of consideration of common law marriages, especially when the English statute expressly declared that such law applied only within the boundaries of England. It is therefore essential to consider how England, as the source of the authority, has acted in relationship to the concept of common law marriage other than in England. Keeping in mind that "the common law of England"[157] also

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[155]P.R.H. Webb, "Common Law Marriage and the Principle of Validation" (1963), 26 MODERN L. REV. 192. at p.192.

[156]Supra, Castel, n.137 at p.84.

[157]"Common Law Marriage Where No Local Law Available" (1968), 74 LAW Q. REV. 327.

includes the English rules concerning the validity of acts done abroad, it can be stated that England has recognized marriages not complying with the lex loci celebrationis by applying the doctrines of lex domicilii and lex fori, in Germany,[158] Italy,[159] Singapore,[160] and Scotland.[161] In Wolfenden v. Wolfenden,[162] the Privy Council held that "colony" and "foreign country" were indistinguishable when considering a common law marriage. It is therefore important to decide, into which category Canada falls when it is regarded by England as a "commonwealth" country.

Canada is no longer a "colony" and most certainly would not be considered a "foreign country". Being described as a "commonwealth" country is of no real assistance as there is no applicable case law. Likewise, England would not, and most certainly could not, claim Canada as part of England. Conversely, Canada, apart from heritage, would not claim to be a part of England. This circular analysis brings consideration back to Lord Hardwicke's Act and the Millis decision. Concisely, it is the interpretation of one word - "abroad".

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[157](cont'd)

[158]Supra, Kochanski v. Kochanski, n.22; Supra, Merker v. Merker, n.84 and Supra, Preston v. Preston, n.61.

[159]Supra, Taczanowska v. Taczanowski, n.24 and Supra, Lazarewicz v. Lazarewicz, n.64.

[160]Supra, n.23.

[161]Supra, n.20.

[162]Supra, n.23.

It is assumed that the House of Lords intended a plain and unambiguous interpretation of such notion of "abroad". It further being assumed that most persons interested in the interpretation of Lord Hardwicke's Act know the relative location, geographically, of both England and Canada in proximity to each other. That being so stated, I can only come to one conclusion that that normal usage of the word, "abroad", conveys the essence of being "wide apart", "away from one's home", "beyond the boundaries of one's own country" and being "elsewhere, other than home grounds". Consequently, there being a separation of the two respective land masses of more or less 5000 kilometers, I can only conclude, that Canada is abroad, from the English viewpoint.

The writer is of the opinion, and therefore, ascribes to the fact that Lord Hardwicke's Act, has no application to Canada rendering the decision of Millis v. Millis completely irrelevant in its application to Canadian law. Having so stated the writer's position, it is now necessary to consider whether the common law marriage has been struck down on other grounds.

In Sheaser v. Sheaser,[63] the Alberta Court of Appeal ruled an invalid marriage where a woman went through a form of ceremony and lived with a man for twelve years believing she was married. Beck, J.A. said:

> "But the plaintiff had gone through the form of marriage with the defendant supposing it to be valid. Had it been valid, she would, in addition to

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[63](1926) 3 D.L.R. 196 (ALTA.C.A.) at p.201.

> what she in fact received, have become entitled to some vested interest as a wife and also become entitled to certain rights which, in the event of his death without adequately providing for her, she could have effective in all probability, against his estate."

Although the court could not find a marriage due to the bigamous nature of the alleged marriage, it did compensate the "wife" for services rendered as a wife, as well as penalizing the man for lying. Unfortunately, the Manitoba King's Bench viewed a "husband" lying to his foreign wife about Canadian marriage laws, as of little consequence. In Stockholder v. Stockholder'[64] a 15 year old relationship was ruled invalid, when a man having obtained a marriage licence, performed the marriage himself, telling the woman that it was unnecessary for a minister to perform the ceremony.

The consequences of non compliance to provincial legislation in the various Marriage Acts has been covered under the appraisal of the 'constitutional issue'.'[65] Suffice it to say, that I am of the opinion that such legislation is directory in nature, and if considered manditory, would be struck down as ultra vires the provincial legislatures.

Two cases arising out of Ontario in the late seventies, give good cause to be perplexed at the varying ways the courts will treat the emergence of the common law marriage

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'[64][1934] 1. W.W.R. 365 (MAN.K.B.).

'[65]Supra, Chapter IV.

in Canada. In Lozinko v. Bazylok'[16] the Ontario High Court, per Goodman, J. held that a valid marriage was contracted on the grounds that the ceremonial formalities required of the woman respondent had been complied with. After the making of such a finding, the learned judge went on to consider "another principle of law". In language that would suggest the recognition of a valid marriage at common law, he cited as his authority Beattie v. Beattie, an Ontario Court of Appeal decision, that had stated in obiter dictum there was a presumption of death after eight years of silence, in an action for alimony based on the presumption in favour of marriage. He stated:'[17]

> "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary."

The learned judge went on to find a valid marriage, "For all the above reasons," having not once referred to the authorities on common law marriages. What was it then the learned judge found to be valid?!! One can only guess, when a "shot gun" approach is used, in the piling of obiter dictum from his own decision, upon pilings of obiter dictum from another case, both of which did not address the issue.

In a similarly confusing decision Dutch v. Dutch'[18] an Ontario County Court Judge on the particular facts of the

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'[16](1976) 27 R.F.L. 141 (ONT.H.C.).

'[17]Id. p.151.

'[18](1977) 1 R.F.L.(2D) 177 (ONT.CO.CT.).

case, held a divorced man liable for the payment of arrears for maintainance of his former wife, where she was living with another man. He first stated the obvious:[16]

> "I have been referred to no decision where the mere living together of a man and woman without present or future words was held to be a marriage at common law."

Assuming that neither counsel asked him to, especially when on the factual situation clearly showed the former wife and her cohabitee had no intentions of marrying, the learned judge went on to discuss the implications of the successor Act to Lord Hardwicke's Act, in relation to common law marriages. He said:[17]

> "I fail to follow defence counsel's argument that because the Marriage Act, 1823, extended only to England (and not to Scotland also) this prevented that Act from being included with all other English law when such law was adoted [sic.] by Upper Canada. I am of the view that this Marriage Act was transported to Upper Canada with the other body of English law and became part of the law of that province to the exclusion of the ~~former~~ English law relating to common law marriages."

In response to the absurdity of such a statement one can only agree that The Marriage Act, 1823, was indeed transported, accepted, even "good law" in Canada, but which, however has no application to Canada as the very statute itself specifically has reference to England and not to other entities "abroad". If indeed the Act has application then, one should read its intent!!

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[16] Id. p.188.

[17] Id. p.188.

As can be readily appreciated, the fate of the common law marriage is, to use a colloquilism, "anybody's guess". Fodden refers to the situation as "problematic"[171] and Holland as "unclear", although the latter authority is of the opinion, "that it does seem unlikely the courts will accept that they still exist".[172] Davies, on the other hand, is hopeful that the Canadian courts will apply the Taczanowska principles in situations that deserve similar equitable remedies.[173] Hahlo feels that "Canadian courts would presumably adopt the same approach"[174] as England. Green reminds the Catholics, for them, the problem is totally irrelevant and in doing so he makes one of the few conclusive statements regarding common law marriages:[175]

> "Catholics cannot contract a valid common-law marriage...Such attempted marriages are always invalid "ratione defectus formae canonicae" and a declaration of nullity must be issued on them before the parties are free to contract another marriage in the Church."

In conclusion, therefore, the writer is of the opinion that a Canadian Court could find a marriage at common law firstly on the basis that Lord Hardwicke's Act, and the Millis decision have no application to Canada. Secondly,

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[171] Supra, Fodden, n.119 at p.2-81.

[172] Winnifred H. Holland, Unmarried Couples, Legal Aspects of Cohabitation, Toronto: Carswell, 1982, p.28.

[173] Supra, Davies, n.14 at p.19.

[174] Supra, Hahlo, n.95.

[175] J. Green, "Problems in Common Law Marriage" (1955), 15 JURIST 301 at pp.316-317.

there being no binding authority in Canada, it could be open to the courts to follow the reasoning embodied in the Kochanski and the Taczanowski decisions.

V. A Review of the Rationale for the Rising Incidence of Cohabitation in Modern Society and Consideration of Empirical Data in Canada as Well as Other Common Law Countries

The rise in the incidence of nonmarital cohabitation has been dramatic in modern society. While most people would agree with such statement, no one can be certain of the intensity of its impact on society due to the nature ofa such phenomenon itself. Unlike marriage, which is self proving by way of registers, nonmarital cohabitation has to be evaluated by data supplied by the cohabitees themselves. Since such information is voluntary and the nature of relationshop is wide and varied so as to even defy definition, the consequential evaluation must be an educated guess at best. This situation is somewhat complicated by the fact that empirical data are sparse.

In England, where nonmarital cohabitation dates back in antiquity, the earliest significant survey was not undertaken until 1976,'''' and the latest in 1981.''' The information was gleaned from census data and cannot be considered very reliable. Likewise in the United States of America, census data were used by Glick & Spanier''' who

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''''Chris Barton, Cohabitation Contracts, Extra-Marital Partnership and Law Reform, Hants. England: Gower, 1985, at p.6.

'''Id. p.7, General Household Survey 1980 & 1981. Analyzed in Brown and Kiernan, Evidence from the General Household Survey, Population Trends 25, Autumn 1981

'''P. Glick & G. Spanier, "Married and Unmarried Cohabitation in the United States" (1980), Journal of

themselves stated that the statistics were not reliable due to the lack of studies and the evasiveness of the people concerned.[179] The American authors estimated, that based on 1975 census data, the most dramatic increase has been since 1970 and involves approximately 1,137,000 unmarried couples.[180] This study substantiated an early study wherein Glick and Norton estimated 2 million people were cohabiting outside marriage. In 1980, Freeman and Lyon[181] agreed with the 2 million figure, although Parker,[182] evaluating the same statistics and others, projected four times this populous based upon illegitimate birth rates, a substantial increase from 38.3% in 1966 to 50.9% in 1976. Glendon[183] is of the opinion that the phenomenon has increased by over 700 percent from 1960 to 1970 and could involve as many as 6 - 8 million people. These extreme predictions would place nonmarital cohabitation at between 3 - 4% of the population in the United States, a tremendous impact on Western civilization. Even if the more conservative figures are accepted, as Skolnick[184] points out, it could be

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[179](cont'd) Marriage and the Family 19.

[179]Id. p.21.

[180]Id. p.20.

[181]M.D.A. Freeman & C.M. Lyon, Cohabitation Without Marriage, Aldershot: Gower, 1983, pp.58-60.

[182]Supra, Parker, n.37 at pp.5-7.

[183]M.A. Glendon, "Marriage and the State: The Withering Away of Marriage" (1976), 62 VIRGINIA L.R. 663. at p.686.

[184]Arlene Skolnick, "The Social Contexts of Cohabitation" (1981), 29 AM. J. COMP. L. 339 at p.347.

representative of a classical culture lag. Illustrative of the lack of meaningful data, is Weitzman's study of 10 couples,'[85] wherein the learned writer stated that a 117 percentage increase between 1970 and 1978 reflected a dramatic increase'[86]

If the studies in England and the United States of America are indicative of a dramatic increase in the incidence of nonmarital cohabitation, then the study conducted by the Institute of Law Research and Reform, Edmonton, Alberta'[87] reflects, and establishes a phenomenal growth factor. A 6.2% (±2%) increase in prevalence of cohabitation and the unmarried rate of 8.8% (±2.5%) among cohabitating couples is of significant relevance. In a careful and well conducted study of 2355 cohabiting respondents extremely interesting data were extracted, giving rise to a well deserved statement, which I feel could be expanded to include all of North America:'[88]

> "This survey to the best of our knowledge, represents a unique attempt to document and compare, from a socio-legal perspective, the living agreements of nonmarried and married cohabitants in Canada"

'[86](cont'd)

'[85]Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers and the Law, New York: The Free Press, 1981, at p.291.

'[86]Id. p.361.

'[87]The Institute of Law Research and Reform, Survey of Adult Living Arrangements - A Technical Report, Research Paper No.15, Edmonton, Alberta, November 1984.

'[88]Id. p.93.

The writer will examine, compare and contrast this study with Glick & Spanier's analysis in some depth at a later stage in this thesis.

Many reasons have been advanced in an attempt to explain the rising incidence of nonmarital cohabitation. In the absence of good and much needed research studies, they are at best "theories". They should be viewed as subjective opinions, although they are representative of a growing interest in the phenomenon by many learned authors. Freeman & Lyon'[8] are of the opinion that the trend in England is due to a conscious decision to pospone marriage, based upon statistics from the General Household Survey of 1980 and 1981, wherein it was learned that 19% of women marrying in the late 70's had lived with their husbands prior to marriage. They concluded that cohabitation was an example of individualism in practice'[9] and Deech postulates the emergence of "trial" marriage.'[10]

There can be little doubt that the women's liberation movement has had a profound influence on attitudes towards marriage. Many feminists regard marriage as the most oppressive form of male-female relationships at one

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'[8]Supra, n.181 at p.57.

'[9]Id, p.206.

'[10]Ruth Deech, "The Case Against Legal Recognition of Cohabitation" reprinted in: J.M. Eekelaar & S.N. Katz (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworths, 1980.

extreme'[192] to just an indicator of individual freedom'[193] reflected by the freedom of choice'[194] of one's own philosophy of life.'[195] In a society where women no longer regard marriage and the family as the chief source of their attention and satisfaction'[196] and where women are more economically independent'[197] the resultant strain on the institution of marriage is clearly evident.'[198] Sexual freedom'[199] and increased social acceptance[200] of cohabitation has lessened the social stigma[201] creating a viable alternative lifestyle to marriage.[202] As Skolnick

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'[192]Supra, Skolnick, n.184 at p.347 and Supra, Freeman & Lyon, n.181 at p.48.

'[193]J.M. Eekelaar & S.N. Katz, The Resolution of Family Conflict, Toronto: Butterworths, 1984, p.43.

'[194]Brenda M. Hoggett & David S. Pearl, The Family, Law and Society - Cases and Materials, London: Butterworth, 1983, p.264.

'[195]Supra, Holland, n.172 at p.2.

'[196]Supra, Freeman & Lyon, n.181 at p.47.

'[197]Id. p.48.

'[198]David S. Caudill, "Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage" (1982), 49 TENN. L. REV. 537 at p.539.

'[199]Supra, Glick & Spanier, n.178 at p.21.

[200]Irving J. Sloan, Living Together: Unmarrieds and the Law, New York: Oceana Publications, 1980, p.vi. See also, Carol S. Brunch, "Non-marital Cohabitation in the Common Law Countries: Patterns of Judicial and Legislative Response" (1981), 29 AMERICAN JOURNAL OF COMPARATIVE LAW 217 at p.283.

[201]Supra, Holland, n.172 at p.2.

[202]Supra, Glick & Spanier, n.178 at p.21.

puts it:[203]

> "Rather, cohabitation must be viewed as part of a transformation of marriage. Not only cohabitation, but divorce and remarriage are part of this transformation, which itself is part of a larger complex of recent changes affecting the family and relationships between the sexes."

As an alternative to marriage, cohabitation does facilitate widely divergent circumstances and varying needs[204] making it, perhaps, far more attractive than marriage.[205] This attractiveness may be the consequence of the high cost of divorce,[206] memories of parental marriage failure,[207] to boredom,[208] or conversely, too high an expectation level[209] resulting in general disillusionment[210] culminating in total avoidance of marriage.

Although one might suspect economic reasons as a base for cohabitation, such is not reflected in the empirical data[211] despite the fact that younger couples as well as

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[203] Supra, Skolnick, n.184 at p.339.

[204] Supra, Weitzman, n.185 at p.237.

[205] Supra, Deech, n.191 at p.310.

[206] Supra, Freeman & Lyon, n.181 at p.55.

[207] Harry M. Fain, Solving the Legal Problems of Unmarried Couples, California: California Continuing Education of the Bar, 1982, p.2.

[208] Supra, Freeman & Lyon, n.181 at p.51.

[209] Supra, Barton, n.176 at p.9.

[210] P. Beth Enos, "The Fearful and Wonderful Ramifications of Marvin v. Marvin" (1979), 10 MEM. ST. U. L. REV. 61 at p.82.

[211] Supra, The Institute of Law Research and Reform, Edmonton, Alberta, n.187 at p.67.

pensioners[212] get a better tax break by living together rather than marrying, in England,[213] the United States,[214] Australia[215] and Canada.[216] Fear of loss of alimony,[217] easier divorce laws,[218] relaxed rental habits[219] to religious ethics[220] may play a part in the rise of cohabitation in contemporary society. Perhaps more integral to cohabitation itself is the legal disability of one or both of the cohabitees by reason of a subsisting marriage.[221]

Quite apart from theories based upon speculative projection and subjective analysis, there have been several studies in recent years, that although preliminary in application, do confirm the rising incidence of nonmarital cohabitation. The Technical Report No. 15 of the Alberta

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[212]Supra, Holland, n.172, Chapter 9, pp.187-229.

[213]Supra, Parker, n.37 at p.7.

[214]Supra, Caudill, n.198 at p.539.

[215]John H. Wade, Defacto Marriages in Australia, Sydney: CCH Australia Ltd., 1981, p.2.

[216]Supra, Holland, n.172 at pp.187-229.

[217]Supra, Sloan, n.200 at p.1.

[218]Charles F. Crutchfield, "Nonmarital Relationship and their impact on the Institution of Marriage and the Traditional Family Structure" (1981), 19 J. FAM. LAW 247 at pp.247-248.

[219]Cheshire & Fifoot, Law of Contracts, 10th Ed., London: Butterworths, 1981, p.322.

[220]Supra, Freeman & Lyon, n.181 at p.51.

[221]Supra, Barton, n.176 at p.7; Deech, n.191 at p.301 and Supra, Weitzman, n.185 at p.365.

Institute of Law Reform, at a 95% confidence level, reported an unmarried cohabitation rate of 8.8% in a survey of 2355 residents of Urban Alberta. A random sampling conducted in the fall of 1983 of Edmonton and Calgary residents resulted in positive responses equally divided, 49.5% males and 50.5% females. The survey encompassed the age group of 16 years or older to 96. "Nonmarital Cohabitants" were defined as:

> Persons living with an unrelated partner of the opposite sex for 6 months or more. Relationship must have included at least one of the following charactersitics:
>
> 1. Sexual Intimacy.
> 2. Emotional Support.
> 3. Dependent children in the home.
> 4. Holding property in common or the pooling of resources. [222]

Glick & Spanier, in their analysis of data obtained from the 1975 Current Population Survey conducted by the United States Bureau of Census based on 100,000 adults, commented that, "rarely does social change occur with such rapidity."[223] Although more vaguely defined, due to the nature of the data, the study was based on "Unrelated adults of the opposite sex...".[224] The two studies attempted to analyze the nature and form of nonmarital cohabitation from

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[222] Supra, The Institute of Law Research and Reform, Edmonton, Alberta, n.187 at pp.3-5.

[223] Supra, Glick & Spanier, n.178 at p.20.

[224] Id. p.19.

different viewpoints and while the American study contained elements of a racial or indigenous applications, certain statistics that are applicable to both countries became apparent. Both studies show nonmarital cohabitation to be a predominantly youthful phenomenon. In the Glick & Spanier study, 85% if the respondents were 35 years old or younger;[225] the Alberta survey indicated a 74.6% rate for the same category.[226] The balance of comparable statistics are perhaps only reflective of the change within society. For example the incidence of nonmarital cohabitation based upon census data in the United States was 2.3% in 1978[227] compared with Alberta in 1983 of 8.8%. The difference may be explained in both the "quality" of the responses and the "time element", however, both studies are indicative of a "change" opposed to a "fad" or "trend".

The statistics on unemployment levels must be viewed with much caution due to the large differences in the population, but, again, the direction is clear. 29% of males and 32% of females in 1975 were unemployed in the United States of America[228] contrasted with 22.6% males and 24.5% females in the Alberta study.[229] Somewhat comparable are the statistics on the duration of nonmarital cohabitation which

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[225] Id. p.22.

[226] Supra, n.187 at p.23.

[227] Supra, Glick & Spanier, n.178 at p.19.

[228] Id. p.25.

[229] Supra, n.187 at p.31.

in Alberta was 2.08 years.[230] The American data showed that in 63% of the cohabitation cases,[231] marriage to the same partner did not necessarily follow, at least within the period of time covered by the study. The state of relative impermanence is substantiated in Barton's observations of English statistics[232] based on data from the General Household Survey 1980 and 1981, specifically Social Trends, 13 Edition, tables 2.10 & 2.11, that the dissolution rate among unmarried partnership is about twice as high as that for marriage.

The Alberta study showed a 13.33 year duration factor for marriage.[233] The only apparent contradictory factor between the Glick & Spanier study and the Alberta Survey was in levels of education. In the former, the nonmarried respondents were more educated than their married counterparts[234] contrasted with the opposite position in Alberta.[235] The latter, showed 28.2% male and 17.0% female cohabitees had one or more university degrees and a further combined percentage of 27.6% had nonuniversity diplomas.

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[230] Id. p.25.

[231] Supra, Glick & Spanier, n.178 at p.21 and Supra, Freeman & Lyon, n.181 at p.57 report 62%.

[232] Supra, n.176 at p.9.

[233] Supra, n.187 at p.25.

[234] Supra, n.178 at p.27.

[235] Supra, n.187 at p.31.

Other interesting statistics not comparable with the Glick & Spanier analysis showed that Albertan nonmarital cohabitees earned less income than their married counterparts,[236] had fewer children,[237] considered religion less important[238] and one quarter of the cohabitees were not free to marry.[239]

When asked why the respondents chose nonmarital cohabitation opposed to marriage, two reasons surfaced, both of which, in my opinion, are interrelated - that of a legal disability of one or both of the cohabitees and avoidance of legal commitment.[240] Commitment was more important to the married couples[241] who were more likely to own a house than the cohabitees.[242] 91.2% of nonmarital cohabitees had separate bank accounts and only 28% shared a joint account, contrasted to 61.2% and 80.3% respectively for married couples.[243] Likewise, the married respondents indicated furniture was jointly held as opposed to separate, or at best, "mixed" property for the nonmarital cohabitees.

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[236] Id. p.17.

[237] Id. p.45.

[238] Id. pp.36-37.

[239] Id. p.74.

[240] Id. pp.73-75.

[241] Id. p.74.

[242] Id. p.51.

[243] Id. p.50.

In the Alberta study, a distinctive approach was used which is of significant and specific interest to this thesis. Nonmarried couples were asked to describe their relationship in terms of either a "common law marriage" or a "close personal relationship". The majority who responded to the category of "common law marriage" tended to have more dependent children of the union[244] having twice as many joint bank accounts[245] and had the lesser ratio of separate bank acoounts at 14.3% to 25.9%.[246] Such responses, I feel, are an indicator that nonmarital cohabitation is a viable alternative to marriage and if such viewpoint is "socially accepted" then legal acceptance of the common law marriage in Canada should unquestionably follow.

In the opinion of the writer, the aforementioned studies clearly establish the rising incidence of nonmarital cohabitation. There is a serious need for more information than is currently available about why people live together.[247] Clearly, Alberta's Institute of Research and Law Reform's decision to continue its legal research in this area by commissioning learned author, Professor Christine Davies, to prepare a definitive legal analysis,[248] is to be

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[244] Id. p.47.

[245] Id. p.57.

[246] Id. p.57.

[247] Supra, Barton, n.176 at p.9.

[248] Such analysis should be available in 1988.

commended. Freeman & Lyon state the situation concisely:[249]

> "We may assume that cohabitation is not a passing phenomenon and that the law must accordingly cope with the problems it raises."

Glendon is somewhat more conservative and views nonmarital cohabitation, even in her much controversial 1976 article, "The Withering Away of Marriage",[250] as perhaps a fashion or trend. At best, she views the change as gradual, with the "family" constantly subject to new concepts.[251] The Alberta study, while informative, is weak, if not completely lacking, in the areas of Access, Custody and Support of children of nonmarital relationships; a void that should be addressed in Davies' research. Ideally, emphasis should be placed on understanding the phenomenon from a practical point of view as it relates to legal reform of children's rights. Whatever the impact of nonmarital cohabitation upon society may be, it ought not jeopardize or diminish the position of children within society. The law has traditionally been slow to adapt to the changing needs of people within society and one has to wonder whether a much bolder approach is needed. The lack of immediate concern, in the opinion of the writer, is embodied in the sentiments of Holland which is to be hoped will not be reflected in

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[249] M.D.A. Freeman & C.M. Lyon, "Towards a Justification of Rights of Cohabitees" (1980), 130 NEW L. J. 228.

[250] Supra, Glendon, n.183.

[251] Id. p.686.

Davies' future recommendations:[282]

> "This is a consequence of the changing role of women in society and their increasing independence. If that is indeed the trend then lawmaking bodies should be cautious about creating a new status of dependence arising from cohabitation."

Caution as to the rights of the female cohabitee may be warranted but such changes in the status of women within society should address the responsibilities attached to "female freedom" where children are concerned. The weakening of the "family" structure brought upon by the emancipation of the female should be commensurate with societal responsibility as well as personal responsibility to offspring of such unions. Anyone, of a reasonable disposition, would support equality for women so long as it does not effect the emotional and physical welfare of their children. Caution is not warranted where such new freedoms create instability followed by resultant harm to children. While one would hope for a balanced approach, I, for one, advocate legally enforceable sanctions upon mothers who place personal freedom before the needs of children within society. To this end, "caution" and "conservatism" should be abandoned for bold and progressive legislation that secures an emphasis on "children's rights" as opposed to irresponsible rights of the individual. Viewed from this perspective, nonmarital cohabitation should be carefully evaluated.

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[282] Supra, Holland, n.172 at p.7.

VI. Status at Common Law of Nonmarital Relationships With Respect to Some of the Areas and Issues of Legal Concern:

A. Effects of a "Cohabitation Agreement"

It is apparent, from the limited studies that have been undertaken, a very high percentage of both married couples and cohabitees do not realize that there are legal differences between the two concepts which give rise to varying legal consequences. This chapter will deal with several areas of law and issues that affect cohabiting and married couples alike concentrating on the reaction of the courts to the rising incidence of cohabitation as evidenced in the previous chapter.

It is beyond the scope of this thesis to legally consider all the aspects arising from cohabitation contrasted against marriage, although the writer hopes to stimulate interest in other areas of the law that need legal consideration in a rapidly changing society. The need for more empirical studies and analysis is essential in order to ensure fair and equitable treatment of citizens living in an era that is saddled with a legal system that has not kept pace with changes in contemporary society. Judicial reasoning must be brought out of the "dark ages" and replaced with enlightened juristic application of the law consistent with emerging mores. As MacDougall so aptly put it:[333]

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[333]Don MacDougall, "Policy and Social Factors Affecting the Legal Recognition of Cohabitation Without Formal Marriage"

> "In an effort to protect individual interests, the legal walls protecting the citadel of the family have been breached so often that it is questionable whether the remnants serve any useful purpose."

Intention to Create Legal Relations

The difficulties of arrangements between people in close personal contact, such as the relationships of marriage and cohabitation, is that, the courts have tended to interpret such arrangements as purely "domestic" in nature. Consequently, such contracts have been held not to be legally enforceable as the parties are deemed not to have intended to ceate legal relations. This concept is embodied in the ratio decidendi in Balfour v. Balfour[254] a decision of the English Court of Appeal. This case evidenced a verbal agreement between a husband and wife, wherein the husband agreed to pay a sum of money to his wife if she would support herself and make no further claims upon him. When the husband breached the contract the wife sued. It was held that the arrangements were purely domestic in nature and therefore not legally enforceable. Justice Atkin, L.J. explained the court's reasoning:[255]

> "I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration

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[253](cont'd) reprinted in: J.M. Eekelaar & S.N. Katz, (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworths, 1980, p.315.

[254][1919] 2 K.B. 571 (C.A.).

[255]Id. pp.578-579.

> in the form within the definition that I have mentioned [a promise for a promise]. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences.... Agreements such as these are outside the realm of contracts altogether.... The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts."

In Deglman v. Guar. Trust Co. of Canada[254] the Supreme Court of Canada applied the doctrine to an agreement between an aunt and her nephew. In return for odd jobs and tasks performed by the nephew his aunt agreed that he would receive the devise of a house. Unable to distinguish the facts from an earlier binding authority[255] the court stated that "the acts" being neutral and having no specific reference to the property under consideration, were either given gratuitously or should be compensated for in money.[256]

The Supreme Court of Canada reaffirmed the doctrine in Lazarenko v. Borowsky,[257] where a male cohabitee verbally agreed to transfer certain lands in return for reestablishment of cohabitation by the female. In holding that the agreement was void by reason of no intention to create legal relations, the highest court in Canada was very careful to avoid the constantly changing face of "public policy".[258] This decision, is not, I would suggest, the

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[254](1954) 3 D.L.R. 789 (S.C.C.).

[255]Maddison v. Alderson (1883), APP. CAS. 467.

[256]Supra, n.256 at p.787.

[257][1966] S.C.R. 556.

[258]Id. pp.560-561.

ringing of the death knell for the "public policy" doctrine, but rather, a realization that "morality" and "public policy" should be assessed by members of society and not Courts of Law.

The presumption of "no intention to create legal relations" continues to be applied between husband and wife in both England[241] and Canada.[242] It also extends to mother-and-daughter[243] as well as father-and-daughter relationships[244] Clearly, the presumption will apply unless there are undisputable intentions to the contrary. The more express the intention the better[245] and the embodiment of agreements into writing would be, subject to consideration to be discussed later,[246] clear evidence of intent of the parties to create legal relations. Where the courts have had to rely on "implied intentions"[247] and the application of contract or trust law to domestic agreements, the outcome has been thwart with uncertainty.[248] The services of the female to the male under the heading of "household services"

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[241]Gould v. Gould, [1969] 3 ALL E.R. 728 (C.A.).

[242]Steinberg v. Steinberg (1963), 45 W.W.R. 562 (SASK.Q.B.).

[243]Jones v. Padavation, [1969] 2 ALL E.R. 616 (C.A.).

[244]Joscelyne v. Nissen, [1970] 1 ALL E.R. 1213 (C.A.).

[245]Supra, Barton, n.176 at p.45.

[246]Infra, Chapter IX.

[247]Infra, Chapter VI.

[248]Infra, Chapter VI.

has been construed to be simple love and affection.[369]

One case to rebut the presumption established in the Balfour decision as applied in Jones v. Padavation,[370] was a decision of the New Brunswick Court of appeal in Dugas v. Dugas' Estate.[371] Although the case involved an agreement between a father and son, the court held a "domestic agreement", legally binding. In this case, the father loaned his son certain monies to repair an automobile and further provided "room and board" on the basis that the son would repay the cost of accommodation together with repayment of the loan at some undetermined future date. Upon the son's death, his executor was held liable. The learned Justice stated:[372]

> "While there is a presumption of fact that in certain transactions between near relatives the parties do not intend to create legal relations, I do not think there is any presumption that where a father loans a substantial sum of money to an adult son to have a car repaired or for other such purposes there is any presumption that the father has no legal rights to recover it."

Although this case appears to be a neophyte decision, it perhaps may be food-for-thought for future judicial consideration of agreements between parties involved in close personal relationships.

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[369] Horrocks v. Forray, [1976] 1 W.L.R. 230 (C.A.) at p.240.

[370] Supra, n.263.

[371] (1978) 23 N.B.R. (2D) 199 (N.B.C.A.).

[372] Id. p.205.

Immorality and Public Policy

Marriage is still the most legally acceptable mode of legitimizing the "living together" of a man and a woman in modern society. It confers status, imposes duties[273] and responsibilities[274] upon the couple. The relationship is not only sanctioned by society[275] but monitored throughout its existence.[276] Society also provides for its demise upon marriage breakdown[277] or death.[278]

Cohabitation, on the other hand, except as provided for by legislative enactments[279] has yet to be accepted by the common law as a "relationship" worthy of absolute legal legitimization. The cohabitees are still faced with the proposition that the union may be legally struck down on the grounds of "immorality" and void as against "public policy".

The concept of "immorality" associated with cohabitation outside of marriage was clearly enunciated in the English decision of Upfill v. Wright.[280] In this case,

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[273]J. McLeod, "Annotation: Palchinski v. Low (1980), 12 R.F.L. (2D) 176 (SASK.Q.B.)" at p.177.

[274]Supra, MacDougall, n.253 at p.314.

[275]See various Marriage Acts, Supra, n.87.

[276]See various Child Welfare Acts, Domestic Relationship Acts and Marriage Property Acts.

[277]Infra, n.553.

[278]See various Intestate Succession Duty Acts and Dower Acts.

[279]Infra, Chapter 7.

[280][1911] 1 K.B. 506.

the plaintiff rented an apartment to a mistress of a well-to-do gentleman knowing that the man would pay the rent. When the rent fell into arrears, an action was commenced for recovery. Justice Darling, after an explosive tyrade on the sin of fornication, left little doubt that living together outside of marriage was immoral and not deserving of judicial consideration:[201]

> "I am of the opinion that this flat was let for an immoral purpose and the fact that the rent was to arise out of letting made it clear that the landlord participated in the illegal or immoral act and in the immoral gains of the defendant. Therefore the case comes within the rule that out of a forbidden or immoral act no cause of action can arise."

While affirming that an agreement based on the grounds of immorality will be struck down, the House of Lords in Fender v. St. John Mildmay[202] reflected on the realities of changing societal mores when damages were awarded to a mistress when a married man refused to marry her after a Decree Absolute had been granted to him. It was reasoned that a promise made between a Decree Nisi and the Decree Absolute of Divorce did not alter the inevitable. Lord Russell of Killowen evidenced sarcasm at changing societal values:[203]

> "The institution of marriage has long been on a slippery slope. What was once a holy estate enduring

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[201] Id. pp.511-512. However, expressly criticising the application of immorality to cohabitees was the decision in Heglibiston Establishment v. Heyman (1977), 121 SOL. J. 851 (C.A.).

[202] [1938] A.C. 1 (H.L.).

[203] Id. pp.34-35.

> for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will."

Hanging on to the past and shedding doubt on the future of cohabitation was Lord Wright's statement:[284]

> "The law will not enforce an immoral promise, such as a promise between a man and a woman to live together without being married or to pay a sum of money or to give some other consideration in return for immoral association."

Reflecting such conservative values was the Manitoba King's Bench decision in Rosentweig v. Swartz[285] and although there may still be remnants of puritanical views that are prejudicial to women[286] a move away from the Fender v. St. John Mildmay is evident.[287] English decisions such as Cooke v. Head[288] and Eves v. Eves[289] are illustrative of the courts relaxed position regarding "immorality" although fears of a dogmatic philosophy still exists in the minds of judges[290] and legal scholars alike.[291]

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[284] Id. p.42.

[285] [1937] 3 D.L.R. 256 (MAN.K.B.).

[286] Supra, Barton, n.176 at p.39.

[287] H.A. Findlay, "The Informal Marriage in Anglo-Australian Law" reprinted in : J.M. Eekelaar & S.N. Katz (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworths, 1980, p.157. See also, Richard Gallen, et al., Unmarried Couple's Legal Handbook, New York: Dell Publishing, 1981, p.136.

[288] [1972] 1 W.L.R. 518 (C.A.).

[289] [1975] 1 W.L.R. 1338 (C.A.).

[290] Diwell v. Farnes, [1959] 2 ALL E.R. 379 (C.A.). for an opposing view, see Ward v. Byham, [1956] 1 W.L.R. 496 (C.A.).

[291] Supra, Cheshire & Fifoot, n.219 at p.322; Supra,

An interesting American case on the subject was Hollenbaugh v. Carnegie Free Library,[212] wherein a female employee was dismissed on the grounds of "immorality" based on cohabitation. Such decision solicited a strong response from one author:[213]

> "Thus, apparently the employees' living arrangement did not exactly affect their ability to perform; what was affected was the willingness of some community members to accept the services offered by the library and its employees."

Specifically on the question of "Immorality", as it relates to cohabitation, the writer was of the following opinion:[214]

> "Given that the term "immorality" is so vague, and that non-marital cohabitation is increasingly acceptable, "men of common intelligence must necessarily guess at [the] meaning of statutes prohibiting immoral conduct insofar as non-marital cohabitation is concerned."

In arguing that increased acceptance of nonmarital cohabitation must necessarily change society's interpretation of morality, the writer makes the following salient point:[215]

> "The crucial factor in any of these provisions [Statutes interpreting what is and what is not

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[211](cont'd) MacDougall, n.253 at p.316 and M.M. Shultz, "Contractual Ordering of Marriage: A New Model for State Policy" (1982), 70 CAL L. R. 204 at p.247.

[212]578 F.2D 1374, 439 U.S. 1052 (1978).

[213]Candice Groot-Hill, "Public Employees and Private Conduct: Cohabitation and the Vagueness of "Immorality"" (1984), 23 J. FAM. L. 111 at p.114.

[214]Id. p.124.

[215]Id p.132.

morality] should be job performance, not morality or immorality of the employee's conduct."

Perhaps a more acceptable position was reflected in the Prince Edward Island Court of Appeal decision in Farrar v. McPhee[296] that also may be found in Atiyah's general observations:[297]

> "But changes in social customs and moral beliefs have in recent years produced a silent and dramatic revolution in the Courts' attitudes to other forms of conduct which used to be regarded as sexually immoral."
>
> "Earlier authorities concerning the illegality of sexually immoral contracts were totally ignored in these modern decisions, and it may be said with some confidence that many of them would not now be followed. But it is no doubt still the law that a contract actually designed to reward someone for sexual favors would be illegal."

The question of immorality and how it should effect public policy has met with rulings against the plaintiff both prior[298] and since[299] the landmark decision in Fender v. St. John Mildmay.[300] However, the majority of recent

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[296](1971) 19 D.L.R. (3D) 720 (sub.nom. Farrar v. Beaton (P.E.I.C.A.).

[297]P.S. Atiyah, An Introduction to the Law of Contracts, 3rd Ed., Oxford: Claredon, 1981, pp.257-258.

[298]Kizko v. Bacyzski (1921), 67 D.L.R. 46 (ONT.C.A.). This case held that an agreement to pay maintenance for support of an illegitimate child born to a woman while married, and living with her husband, invalid on the grounds of immorality based on public policy.

[299]Frere v. Shields, [1939] 2 W.W.R. 396 (SASK.C.A.). An agreement signed by the defendant as an inducement for renewed cohabitation unenforceable as against public policy. Cohabitee recovered on the basis of quantum meruit.

[300]Supra, n.283.

English decisions[300] appears to substantiate the position that the "public policy" doctrine has outlived its usefulness. Findlay, in my opinion, views the situation realistically:[301]

> "It is refreshing - or alarming, depending on the point of view, - to note that the attitude of the courts to sexual morality have undergone quite marked changes in recent times."
>
> "The unruly horse of public policy has been tamed sufficiently, it seems, for justice inter parties not to be defeated by insistence on the ceremony which has come to be regarded as of diminishing significance in present day society."

The question of immorality as it has been viewed from the perspective of Resulting, Implied and Constructive Trusts, together with express "Cohabitation Contracts" will be discussed in further detail in appropriate segments of this thesis.

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[300] Supra, Cooke v. Head, n.288. See also, Dyson Holdings Ltd. v. Fox, [1975] 3 ALL E.R. 1030 (C.A.); In Re Ever's Trust, [1980] 3 ALL E.R. 399 (C.A.); Tanner v. Tanner, [1975] 3 ALL E.R. 776 (C.A.) and John L. Dwyer, "Immoral Contracts" (1977), 93 LAW Q. REV. 386.

[301] H.A. Finlay, "The Battered Mistress and the Violent Paramour" (1978), 52 A.L.J. 613, pp.613 & 615.

B. Resulting, Implied Trusts and Agreements Together With Consideration of the Doctrine of Constructive Trust Arising From an Interest in Home, Business, or Real Property and Personal Property.

The concepts of resulting, implied and constructive trust have met with blurred distinctions by the courts in both England and Canada.[303] Such concepts have been interchanged, referred to collectively, as well as individually, by the courts to facilitate equitable decisions both for the institutions of marriage and cohabitation. Professor Leonard Pollock, Q.C. succinctly sums up the situation:[304]

> "The present confusion between a constructive and resulting trust (if indeed there ever was a time when there was clarity) makes a real distinction almost impossible to achieve."

When such trust doctrines are intermingled with the concept of implied and constructive agreements emanating from contract law, one cannot but totally agree with Professor Pollock's statement.

The writer will therefore not attempt to distinguish the legal differences between the concepts of resulting, implied and constructive trusts individually; rather, they will be viewed as having a "collective" influence as equitable remedies on both marriage and cohabitation.

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[303] Rathwell v. Rathwell (1978), 83 D.L.R. (3D) 289 (S.C.C.).

[304] Leonard Pollock, "Matrimonial Property and Trust: The Situation from Murdoch to Rathwell" (1978), 16 ALTA. L.R. 357 at p.359.

Distinctions will, of course, be drawn on how the doctrines have been applied so as to differentiate between married persons and cohabitees, the consequences of which have resulted in perplexing patterns of inconsistencies. Later in this chapter the "Constructive Trust" doctrine will be viewed from the aspect of "Unjust Enrichment" in Canadian decisions and further discussed within the ambit of American jurisprudence at an appropriate juncture in this thesis.[305]

In England, in cases where inequities were perceived to be evident in property settlements of both marriage and cohabitation relationships, some courts have applied the "trust doctrines"[306] while others have applied contract and "quasi" contract law.[307]

Zuckerman is of the opinion that the Balfour[308] decision has reduced application and immorality not applicable in "trust" decisions but may still apply to "contract" situations.[309] If both remedies fall under the heading of "equitable" remedies, it is difficult to understand the reason for the distinction. For this reason distinctions between the two doctrines will not be made with

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[305]Infra, Chapter VIII.

[306]Supra, Cooke v. Head, n.288 and Hardwick v. Johnson, [1978] 2 ALL E.R. 935 (C.A.).

[307]Supra, Eves v. Eves, n.289. See also, Richards v. Dove, [1974] 1 ALL E.R. 888 (CH.DIV.) and Chandler v. Kerley, [1978] 1 W.L.R. 693 (C.A).

[308]Supra, n.254.

[309]A.A.S. Zuckerman, "Formality and the Family-Reform and the Status Quo" (1980), 96 LAW Q. REV. 248.

the sole exception of the concept of "quantum meruit".

Interest in a Home, Business or Real Property.

The application of the law of trusts in the area of "family" law with respect to real and personal property emerged from two English cases, Pettitt v. Pettitt[310] and Gissing v. Gissing[311] In the latter case the court had to consider if a wife was entitled to a share in the matrimonial home, the title to which was registered in the husband's name. The husband had made the down-payment and paid the mortgage payments. The wife had paid for the furnishings and for the sodding of the lawn. After twenty five years of marriage the husband left the wife telling her "the house is yours". At trial, the husband was declared to be the sole owner of the property. On appeal the decision was reversed. The House of Lords, on a further appeal by the husband, reinstated the trial judge's decision. Lord Diplock stated that:[312]

> "Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate is vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust."

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[310][1970] A.C. 777 (H.L.) See also, Button v. Button, [1968] 1 ALL E.R. 1064 (C.A.).

[311][1971] A.C. 886 (H.L.), applied in Heseltine v. Heseltine, [1971] 1 ALL E.R. 952 (C.A.).

[312]Id. p.904.

These cases dealt with the aspects of the "common intention" and "substantial contributions" of the parties to the property in question.

In the absence of either "common intention" or "substantial contribution", the apparent prevailing English position, at that time, was not to award an interest to the plaintiff although certain authorities to the contrary awarded varying percentage interests.[313] Indicative of such reasoning was the Alberta Court of Appeal's decision in Fiedler v. Fiedler.[314] In that case, the court was unable to find a common intention to acquire an interest in property by way of a constructive trust, even where $51,000.00 of indirect contributions was made by the plaintiff.

In the now infamous case of Murdoch v. Murdoch,[315] an earlier decision of the Alberta Court of Appeal, the court had to reason between the Supreme Court of Canada's harsh

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[313] Hazel v. Hazel, [1972] 1 ALL E.R. 923 (C.A.) - 1/5th interest; Cowcher v. Cowcher, [1972] 1 ALL E.R. 943 (FAM.DIV.) - 1/3rd interest; Griffiths v. Griffiths (1974), 1 ALL E.R. 932 (C.A.) - increased monetary award; Browne v. Pritchard, [1975] 3 ALL E.R. 721 (C.A.) - 1/3rd interest and Haldane v. Haldane, [1977] A.C. 673 (P.C.) - 1/4th interest. For a bewildering array of varying reasonings for awarding a 1/2 interest. See also:
Fribance v. Fribance, [1957] 1 ALL E.R. 357 (C.A.);
Silver v. Silver, [1958] 1 W.L.R. 259 (C.A.);
Nixon v. Nixon, [1969] 3 ALL E.R. 1133 (C.A.);
Smith v. Barker, [1970] 2 ALL E.R. 826 (C.A.);
Hargrave v. Newton, [1971] 3 ALL E.R. 866 (C.A.) and
Burke v. Burke, [1974] 1 W.L.R. 1063 (C.A.).

[314] (1976) 20 R.F.L. 84 (ALTA.C.A.).

[315] (1974) 41 D.L.R. (3D) 367 (ALTA.C.A.), (1975) 1 S.C.R.423.

approach in Thompson v. Thompson[316] and the compassionate reasoning in Trueman v. Trueman.[317] The former case awarded nothing to the wife with respect to a property settlement while the latter considered a one-half interest a fair and reasonable settlement.

In the Thompson case the court adopted the strict, narrow approach:[318]

> "But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of the marriage and cohabitation and the fact the property in question is the matrimonial home."

Diametrically opposed, the court in Trueman stated:[319]

> "Certainly a wife would not agree to assume these additional duties if she realized that she would have no interest in the property when the marriage was terminated."
>
> "Surely if services which the appellant rendered relieved the respondent from employing extra help to do the work which the appellant did, the value of such work should be counted as a contribution..."

Murdoch applied Thompson and the result added more fuel to the rising tide of public furor which ultimately resulted in legislative enactment[320] in order to avoid further travesties of justice.

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[316][1961] S.C.R. 3.

[317][1971] 18 D.L.R. (3D) 109 (ALTA.C.A.).

[318]Supra, n.316 at pp.13-14.

[319]Supra, n.317 at pp.115-116.

[320]The Family Law Reform Act, S.A. 1975, s.1(3)(c).

The Supreme Court of Canada reaffirmed that Murdoch should be narrowly construed in Rathwell v. Rathwell[321] stating that such decision did not overrule the Trueman decision.

In Babrociak v. Babrociak,[322] an Ontario Court of Appeal decision, a constructive trust was held, the court affirming that property disputes are now settled pursuant to the Family Reform Act, 1978. However, massive reform in Family Law has recently been passed.[323]

Professor Pollock, in a rather picturesque style stated the situation prior to, the Rathwell decision:[324]

> "In reaching its decision in Fiedler, the Alberta Court of Appeal seemed to turn its back on its precocious child conceived in Trueman and allowed what seemed to be the start of a miscarriage in Murdoch to become an abrupt abortion in Fiedler."

As a consequence of such decisions and together with provincial enactments that provide for equitable division of "family assets", the large majority of spouses appears to be adequately protected with respect to the Home, Real Property and Business, wherein both husband and wife are actively

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[321] Supra, n.303 See also, Price Waterhouse v. Arnoff (1982), 41 O.R. (2D) 480 (C.A.), and Pratt v. MacLeod (1981), 129 D.L.R. (3D) 123 (N.S.S.C.).

[322] (1978) 1 R.F.L. (2D) 95 (ONT.C.A.).
See also two earlier decisions from the same court: Re Whitely and Whitely, [1975] 4 O.R. (2D) 393 (C.A.), Madisso v. Madisso, [1975] 5 O.R. (2D) 492 (ONT.H.C.) reversed on appeal [1976] 11 O.R. (2D) 441 (C.A.).

[323] Family Law Act, S.O. 1986, C.4, and the Family Law Amendment Act, (Bill 111) Royal Assent: July 10, 1986.

[324] Supra, n.303 at p.362.

involved. Such can not be said for cohabitees.

There has been much confusion with the courts in both England and Canada with respect to the most equitable approach to be taken with respect to cohabitation. This, in part, is due to the nature of the phenomenon itself. Marriage is a commitment by the couple to themselves and to society, the consequences of which results in a societal status. Unfortunately, this cannot be said of cohabitation. As we have seen[325] there are a great many reasons that have been proferred in an effort to explain the rising incidence of cohabitation within society. Consequently, the courts have been reluctant to impose a unified structure upon cohabitation unless there existed a wrong which needed to be redressed. The resultant applications have witnessed a variety of individual case decisions, that simply stated, is somewhat bewildering. Prior to the decision in Pettitt and Gissing the Canadian courts swayed from awarding nothing to a female cohabitee[326] to a full one-half interest on a verbal promise in contract law[327] as well as in trust law,[328] where the period of cohabitation had been sixteen and fourteen years respectively, in the latter two cases.

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[325]Supra, Chapter 4.

[326]Stagg v. Ward and Ward (1921), 30 B.C.R. 385, and Rowe v. Public Trustee, [1963] 2 O.R. 71 (ONT.H.C.).

[327]Kutsenko v. Wasilenko (1959), 19 D.L.R. (2D) 665 (SASK.C.A.).

[328]Stanley v. Stanley (1960), 30 W.W.R. 686 (ALTA.S.C.) affirmed 39 W.W.R. 640 (ALTA.C.A.), leave to appeal to the S.C.C. granted 40 W.W.R. 181.

Likewise, in England, Lord Denning granted a one-half interest to a female plaintiff even in the absence of cohabitation where only sexual intercourse had taken place. Cooke v. Head,[329] was distinguished two years later in Richards v. Dove.[330] The latter case was most disturbing in that there had been nine years of cohabitation where the female cohabitee had paid to the defendant one-half of the downpayment on the purchase price of the home.

In the early and mid seventies there appeared to be a gradual trend in both England and Canada wherein the female cohabitee was awarded at least a percentage interest in the property, such as a one-ninth interest,[331] a one-quarter interest,[332] a one-third interest.[333] to a full one-half interest[334] even where the cohabitation had been only a year in duration[335] or less.[336]

It is extremely difficult to ascertain what relevant facts were influential in the court's decisions. The "intention to marry" appeared to be important as evidenced

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[329]Supra, n.288.

[330]Supra, n.306.

[331]Re Densham, [1975] 3 ALL E.R. 726 (CH.DIV.).

[332]Supra, n.289.

[333]Locke v. Locke (1976), 30 R.F.L. 244 (ONT.S.C.).

[334]Smith v. McLeod (1972), 9 R.F.L. 39 (ONT.S.C.) and Ahone (Smith) v. Ahone (1975), 20 R.F.L. 290 (B.C.S.C.).

[335]Paul v. Constance, [1977] 1 ALL E.R. 195 (C.A.).

[336]Ruff v.Strobel, [1978] 3 W.W.R. 558 (ALTA.C.A.).

in Eves v. Eves, Cooke v. Head and Tanner v. Tanner. However, in Pascoe v. Turner[337] not only was there clear evidence of the female's refusal to marry but upon the male cohabitee's appeal a "constructive trust" for a one-half interest was turned into an absolute right in "Fee Simple". Conversely, a finding of "no intention to marry" has had an adverse affect[338] as clearly enunciated in Palchinski v. Low:[339]

> "Likewise there is no evidence that either considered theirs to be a permanent relationship. Marriage, of course, assumes that."

Children[340] and the duration of the relationship[341] appear to be important considerations as was the concept of direct[342] and indirect[343] contributions. Behavior that was "likened" to marriage was rewarded by the court as in Crisp

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[337][1979] 2 ALL E.R. 945 (C.A.).

[338]Helby v. Rafferty, [1978] 3 ALL E.R. 1016 (C.A.); Colin Smith Music Ltd. v. Ridge, [1975] 1 ALL E.R. 290 (C.A.); Supra, Diwell v. Farnes n.290 and Supra, Richards v. Dove, n.307.

[339]Supra, n.273 at p.181.

[340]Supra, Eves v. Eves, n.289; Supra, Tanner v. Tanner, n.301 and Supra, Chandler v. Kerley, n.307. See also, Supra, Freeman & Lyon, n.181 at p.151; Spurgeon v. Aasen (1965), 52 W.W.R. 641 (B.C.S.C.) and Supra, In Re Ever's Trust, n.301.

[341]Supra, Dyson Holdings Ltd. v. Fox, n.301 and Supra, Helby v. Rafferty, n.338. See also, Gammans v. Ekins, [1950] 2 ALL E.R. 140 (C.A.).

[342]Supra, Hazel v. Hazel, n.313; Supra, Eves v. Eves, n.289 and Supra, Cooke v. Head, n.288. See also, Hussey v. Palmer, [1972] 3 ALL E.R. 744 (C.A.)

[343]Supra, Pascoe v. Turner, n.337 and Supra, Diwell v. Farnes, n.290.

v. Mullings,[344] although the courts had difficulty in equating marriage with cohabitation in Bernard v. Josephs[345] and Dennis v. McDonald.[346]

The "common intention" of the parties, as we have seen, is inextricably interwoven with the application of both contract and trust law as it relates to property disputes in marriage as well as cohabitation. In Coles v. Ferguson[347] the Alberta Court of Appeal had to consider the "intention" test in a rather extreme case of greed. The male cohabitee had been asked to enter into cohabitation by the female owner of a residential home. The man not only was instrumental in taking the woman off "welfare" but further supported her children of a former marriage together with one child of the relationship. During the five years of cohabitation he spent over four hundred man hours on building an addition to the house at a personal cost of Thirty One Thousand, Four Hundred and Fifteen dollars ($31,415.00). After the work had been completed the female cohabitee ejected the man from the house. It was proven at trial that the woman had insidiously planned over the five year period that once the renovations had been completed she would end the relationship. In the finding of a resulting

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[344](1975) 239 E.G. 119.

[345][1982] 3 ALL E.R. 162 (C.A.).

[346][1981] 2 ALL E.R. 632 (FAM.DIV) appeal dismissed [1982] 1 ALL E.R. 590 (C.A.).

[347](1980) 13 R.F.L. (2D) 193 (ALTA.C.A.).

trust, erroneously in my opinion,[344] the court stated:[345]

> "...Mr. Ferguson was permitted to continue in the belief that the house was "our home" "being built for" "our family" with "our money". Only when the construction was virtually complete did Mrs. Coles' attitude in this respect change. In my view he could reasonably draw the inference from her conduct that he was to share in the results of his labour and money."

As McLeod aptly points out, the "intention" test logically has to be an objective one[350] which in this case was contrasted against the subjective goal of the defendant which was to deprive the man of his work and money.

The Supreme Court of Canada in Pettkus v. Becker[351] has perhaps developed a way of avoiding the use of the resulting trust doctrine[352] and the complexities in the application of trust law or contract law, to the concept of "constructive trust"[353] by the use of the doctrine of "unjust enrichment". In this decision, the notion that a constructive trust could

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[344]The court held there was no express agreement and yet still found a resulting trust by way of "inference", which, I submit, should have given rise to a "constructive trust."

[345]Supra, n.347 at p.201.

[350]J. McLeod, "Annotation: Coles v. Ferguson (1980), 13 R.F.L. (2D) 193 (ALTA.C.A.)".

[351](1980) 5 R.F.L. (2D) 344 (ONT.C.A.) affirmed (1981), 19 R.F.L. (2D) 165 (S.C.C.).

[352] H. J. Folberg, "Domestic Partnership: A No-Fault Remedy for Cohabitors" reprinted in: J.M. Eekelaar & S.N. Katz (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworths, 1980, p.349. The learned author comments on the use of the Resulting Trust Theory for cohabitees. See also, A.J. McClean, "Case Note: Pettkus v. Becker (1980) 117 D.L.R. (3D) 257 (1982), 16 U. BRIT.COLUM. L. REV. 155 at p.183.

[353]For an opposing view, see Parker, n.37 at p.146.

be found on the basis of "unjust enrichment" if the following principles are present:[354]

1. There must be a finding of an unjust enrichment, and,
2. Such unjust enrichment was gained to the detriment of the plaintiff, and
3. Absence of any juristic reason for the enrichment.

Prior to the Pettkus decision, courts in England and Canada have continued on a "piecemeal" basis, striking down the plaintiff's claims,[355] awarding partial interests[356] as well as one-half interests[357] in disputes concerning the "family" home, businesses and real property. As one writer points out[358] the move from contract to trust law avoids the problems of "illicit consideration" as well as the "intention" argument.

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[354] Supra, n.351.

[355] Holli (Kost) v. Kost (1972), 7 R.F.L. 77 (B.C.S.C.); Re Mandryk; Wegwitz v. Mandryk (1980), 6 E.T.R. 104 (SASK.Q.B.) and
Manley v. Schiller (1980), 18 R.F.L. (2D) 109 (B.C.S.C.).

[356] Re Cooper (1980), 7 E.T.R. 118 (ONT.DIV.CT.) - Lump sum award; Schupbach v. Rambo (1981), 26 B.C.L.R. 154 (S.C.) - 1/3rd interest in a house and sail boat;, McCauley v. Simpson (1981), 26 B.C.L.R. 384 (B.C.S.C.) - 20% of equity; Murray v. Roty (1982), 36 O.R. (2D) 641 (ONT.H.S.) affirmed (1983), 41 O.R. (2D) 705 (C.A.) - 40% interest of increased equity in two houses and 20% in the increased equity of a farm.

[357] Greasley v. Cooke, [1980] 3 ALL E.R. 710 (C.A.), and Young v. Lim (1981), 6 A.C.W.S. 316 (ONT.H.C.).

[358] Phillip Girard, "Concubines and Cohabitees: A Comparative Look at "Living Together"" (1983), 28 McGill L. J. 977 at p.986.

Professor Pollock argues, very effectively, that had the courts been "enlightened" both the Fiedler and the Murdoch decisions could have been decided on the doctrine of "unjust enrichment"[359] thereby rendering more equitable decisions. However, the doctrine of "unjust enrichment", while perhaps being a remedial vehicle for progressive change, has been received by the judiciary warily. In Yohnke v. Thomson Estate[360]. conservative values persisted in the Saskatchewan Queen's Bench even after twenty one years of cohabitation. Likewise, the British Columbia Supreme Court in Niederberg v. Memnook[361] also opted not to find "unjust enrichment", both courts striking down the plaintiffs' claims.

In direct contrast, the very same jurisdictions, in the same year, applied Pettkus, granting a one-half interest in Rochon v. Emary[362] and Reiss v. Reiss,[363] such cases involving ten years and fourteen years of cohabitation respectively. Harpum, is of the opinion that Pettkus is unlikely to receive the blessing of the House of Lords on the basis that the law of restitution as well as "unjust enrichment" is concerned with "improper gain" and not deprivation of the plaintiff. A recent decision of the

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[359] Supra, n.304 at p.361.

[360] (1981) 14 SASK. R. 129 (Q.B.)

[361] (1981) 130 D.L.R. (3D) 353 (B.C.S.C.).

[362] (1981) 21 R.F.L. (2D) 366 (B.C.S.C.).

[363] (1981) 22 R.F.L. (2D) 152 (Sask.Q.B.).

English Court of Appeal[364] echoes the more traditional approach to "cohabitation" relationships and may reflect the painful absence of Lord Denning on the court. As Parker puts it:[365]

> "It would now seem, however, that without Lord Denning at its helm, the Court of Appeal is adopting a more rigorous approach, much more in line with the dictates of property law."

It would appear from modern case law that the courts are willing to extend protection to a wife with respect to a one-half interest in the matrimonial home, business and real property. Conversely, the cohabitee faces a world of uncertainty with the courts vacillating unpredictably. With the principle enunciated in Pettkus v. Becker together with the doctrine of "quantum meruit",[366] the courts have the necessary vehicles to ensure equitable remedies in both marital and cohabitation situations. Whether the two relationships will ever gain parity is a question of conjecture. In my opinion, Oliver captures the essence of the issue when she stated:[367]

"...a wife will usually be given a larger share of

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[364] Burns v. Burns, [1984] 1 ALL E.R. 244 (C.A.).

[365] Diana Parker, "Cohabitants, Their Homes and the Winds of Change" (1984), 14 F.L. 40.

[366] Holmes v. Holmes, [1927] 2 D.L.R. 979 (ALTA.S.C.); Buchmaier v. Buchmaier (1971), 6 R.F.L. 382 (B.C.C.A. and Raccette v. Bearden (1977), 1 E.T.R. 211 (SASK.Q.B.). See also, Gareth Jones, "Restitutionary Claims for Services Rendered" (1977), 93 L. Q. R. 273, and Supra, Holland, n.172 at pp.47-54.

[367] Dawn Oliver, "The Mistress in Law" [1978] Current Legal Problems 81 at p.85.

the equity than a mistress, presumably as a result of subconscious application of the marriage model."

Personal Property

Chattels forming part of a business between a husband and wife appears not to be a problem for the courts; equal division seemingly appropriate.[366] Likewise, contributions out of a "joint bank account" is sufficient to turn personal property into a one-half interest in real property.[367] With respect to other personal property such as furniture, automobiles, bank accounts and individual personal items there appears to be little or no contentiousness as to division.[370] Married persons usually are able to divide personal property on an equitable basis, partly because in the absence of mutual agreement such property would be eaten up in legal fees. Engagement rings need not be returned[371] although wedding gifts must be returned to the donor if given conditionally on the wedding taking place regardless of which party broke the engagement.[372] Parry, succinctly states the position of the cohabitees:[373]

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[366]Kowalchuk v. Kowalchuk (1974), 45 D.L.R. (3D) 716 (MAN.Q.B.).

[367]Beard v. Beard, [1965] 1 O.R. 165 (H.C.).

[370]Even when conflict exists, traditional values prevail. See Spellman v. Spellman, [1961] 2 ALL E.R. 498 (C.A.).

[371]Martin L. Parry, Cohabitation, London: Sweet & Maxwell, 1981, p.19.

[372]Id. p.21.

[373]Id. p.22.

> "Property belonging to each at the start of the cohabitation and personal items acquired during cohabitation, will remain the property of each, as will personal gifts between the parties."

Gifts between parties can be created in several ways:[377]

i. By express language in a deed,

ii. By the donor's intention to pass property to the donee together with actual delivery of the propery,

iii. By the donor's intention to pass property to the donor together with constructive delivery.

Vaines, expresses the nature of "intention" and its importance:[378]

> "It is also essential that the donor had intention to give (d); he must be certain as to his objects and have a perfect knowledge of the nature and effect of the transaction, of the extent of the benefit he is conferring and, of the amount of beneficial interest of which he proposes to divest himself..."

Holland also points out the difficulty with "delivery" when each of the parties have purchased items individually and share them collectively.[379] With the advent of the constructive trust doctrine the presumption of advancement between spouses appears to have little relevance in modern society. However, this presumption clearly never applied to

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[377] Supra, Wade, n.215.

[378] Crossley Vaines, Personal Property, 5th Ed., London: Butterworths, 1973, p.301.

[379] Supra, n.172 at pp.83-86.

cohabitees,[377] although as Wade points out, since Pettitt v. Pettitt there is some room for doubt.[378]

Bank Accounts that are held jointly present little difficutly as in most cases the banking documentation requires equal division regardless of the proportions contributed. Conversely, if the parties indicate otherwise the intention should be reasonably clear that equality is not desired. Where the bank accounts are in separate names, in the case of spouses, no interest arises, although as Barton points out, a contrary intention may be found with cohabitees.[379]

There appears to be a trend in contemporary society to bring about equality between the sexes although built-in biases and prejudices undoubtedly exist. Therefore, if cohabiting couples or spouses anticipate difficulties with the division of personal property upon disolvement of the relationship, the "intention" should be made clear. If unequivical evidence is required, such intentions should be reduced into writing.

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[377] Supra, Holland, 375 at pp.83-85.

[378] Supra, Wade, n.215. See also, Soar v. Foster, [1858] 70 E.R. 64 and Supra, Silver v. Silver, n.313.

[379] Supra, Barton, n.176 at p.18. See also, Supra, Paul v. Constance, n.335.

C. Rights Under Wills and Life Insurance Policies, Together With the Rights of a Surviving Cohabitee Against a Deceased Cohabitee's Estate.

A wife cannot be totally divested by the husband under the terms of a will. Legislative enactments such as the Dower Acts and the Testator's Maintenance Acts give certain rights to a wife arising from the status of marriage. There are no such rights extended to a cohabitee. Even in the event of intestacy, the wife has certain rights under Intestate Succession Acts, whereas the female cohabitee has no rights. Consequently, the cohabitee is at a decided disadvantage where the male cohabitee wishes not to name the female cohabitee as a beneficiary under the terms of a will.

However, a cohabitee will inherit when named as a beneficiary even when referred to as "my wife". In the English case of Re Lynch[300] the court had to decide whether a cohabitee could inherit when referred to in a will as "my wife Annie Ethel Lynch". Of particular interest was a clause that provided for a "gift over" upon death or remarriage "of my wife." It was held that the testator had created his "own dictionary" and "wife" and "remarry", upon construction, meant the cohabitee until she marries.

The only comparable Canadian case was Blanchett v. Hansell[301] which involved a certificate of insurance wherein

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[300] [1943] 1 ALL E.R. 168 (CH.DIV.).

[301] [1943] 3 W.W.R. 275 (MAN.K.B.) affirmed [1944] 1 D.L.R. 799 (MAN.C.A.).

the female cohabitee was referred to as "wife". In this case the male cohabitee was not free to marry there being a subsisting marriage. The court stated:[3]

> "I cannot believe that the society ever intended to "strain at a gnat and swallow a camel" - to withold its benevolance from a needy housekeeper concubine in order to bestow them upon a faithless wife."

The court went on to decide that an express exclusionary clause prohibiting a "common law wife" from inheriting, did not apply to the plaintiff, as it was legally impossible for her to fall under this heading due to legal incapacity. It is interesting to consider my next point - a marriage acts to revoke a will whereas cohabitation does not. Where would a valid common law marriage stand? Notwithstanding the importance of such a question to a common law spouse, this area of the law favours the cohabitee over the legal spouse. A witness and the spouse of the witness disqualifies that party from inheriting under a will. A cohabitee of a witness to a will is not so disqualified.[3]

Holland in Canada[3] and Barton in England[3] point out the importance of a cohabitee to have an "insurable interest" based upon dependancy or pecuniary interest. Green, points out that the position in the United States is

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[3]Id., p.281.

[3]Supra, Parry, n.371 at p.98.

[3]Supra, Holland, n.172 at pp.181-182.

[3]Supra, Barton, n.176 at p.20.

still unclear although he states, claims are rarely denied by Insurance Companies.[3**] This would appear to be the position in Canada although the case law is sparse. In Kirby v. Booth[3**] a claim was actionable in a cohabitational relationship of three years wherein the court termed the male cohabitee's existence as a "double life". The description of "wife" in an insurance policy was deemed not to be fraud as the deceased "...regarded and treated [the beneficiary] as his wife.[3**]

Direct claims against a deceased's estate by a cohabitee have not been as successful. In Prokop v. Kohut[3**] the British Columbia Supreme Court disallowed a cohabitee's claim against a deceased's estate after sixteen years of cohabitation. Further, in what the writer can only term as extremely unconscionable, Justice MacDonald of the Alberta Supreme Court awarded only funeral, hospital and incidental expenses after thirty eight years of cohabitation. The learned justice stated:[3**]

> "In the case at bar I hold that no implication of law in favour of the plaintiff can be founded on the fact of cohabitation or upon the household needs of the parties."

[3**] Supra, Green, n.10 at pp.180-181.

[3**] [1964] 1 O.R. 286 (H.C.).

[3**] Id. p.292.

[3**] (1965) 54 D.L.R. (2D) 717 (B.C.S.C.).

[3**] Swan v. Public Trustee, [1972] 3 W.W.R. 696 (ALTA.S.C.) p.700.

In an equally harsh decision, the Nova Scotia Supreme Court in Brown v. Millett[3'1] disregarded the needs of a female cohabitee in a twenty five year old cohabitation relationship in favour of two brothers of the deceased.

Where the court has to choose between a cohabitee and an existing estranged spouse the latter will undoubtedly be favoured. As Parry concisely sees the issue:[3'2]

> "Despite recent developments, the rights of a cohabitee on the death of a partner are far less extensive than the rights of a surviving spouse and the law does not reflect the change in social attitude to unmarried partnerships referred to in Dyson Holdings Ltd. v. Fox."

This position appears to be consistent with the Canadian trend as evidenced in two recent decisions.[3'3] Likewise, in the Alberta study[3'4] there was a weak consensus as to the rights of cohabitees to the estate of cohabiting partners, although the majority of those surveyed felt children of such unions should share in the estate.[3'5] The case law overwhelmingly supports this proposition with respect to the children's rights.[3'6]

[3'1](1979) 6 E.T.R. 88 (N.S.S.C.).

[3'2]Supra, Parry, n.371 at p.98.

[3'3]Phipps v. Cartmill (1980), 25 B.C.L.R. 222 (S.C.) and Kelly v. Bourne Estate (1981), 50 N.S.R. (2D) 226 (C.A.).

[3'4]Supra, The Institute of Law Research and Reform, Edmonton, Alberta, n.187 at pp.78-79.

[3'5]Id. p.81.

[3'6]In Re Shepard; George v. Thyer, [1904] 1 CH. 456; Re Taylor, [1961] 1 ALL E.R. (C.A.); Jelley v. Illiffe, [1981] 2 ALL E.R. 29 (C.A.); Barnett v. Wise, [1961] 26 D.L.R. (2D) 321 (ONT.C.A.) and Williams (Offley) v. Williams (1977), 4 B.C.L.R. (PROBATE S.C.).

D. Occupation of the Home, Upon Separation or Death of One of the Cohabitees

Most of the case law concerning occupation of "the home" stems from England. One can only assume that this situation exists, more that likely, because of the scarcity of rental properties and residential properties generally opposed to more availability of such properties in Canada. Rent controls are prevalent in England and this fact together with less societal mobility places more emphasis on the retention of occupational rights in both marriage as well as cohabitational relationships.

It would appear reasonably clear, that in cases where violence is present English courts have extended protection to the female under the Domestic Violence and Matrimonial Proceedings Act,[397] both for marriages[398] and cohabitation relationships[399] which may also extend to situations of non-violence where minor children are involved.[400] This appears not to extend to situations where title is held jointly.[401]

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[396](cont'd)
[397]1976, s.1(2).

[398]Bassett v. Bassett, [1975] 1 ALL E.R. 513 (C.A.) and Rennick v. Rennick, [1978] 1 ALL E.R. 817 (C.A.)

[399]Davis v. Johnson, [1979] A.C. 264 (H.L.) and Adeoso v. Adeoso, [1981] 1 ALL E.R. 107 (C.A.).

[400]Spindlow v.Spindlow, [1979] 1 ALL E.R. 169 (C.A.).

[401]Duggan v. Duggan, [1965] 2 O.R. 651 (ONT.H.C.) and Cantliff v. Jenkins, [1978] 1 ALL E.R. 836 (C.A.).

The presence of children appears to be an important factor both in England[402] and Canada,[403] although there are notable, harsh decisions to the contrary.[404]

The concept of "family" also appears to be important although the case law indicates conflicting views. Gamman v. Ekins,[405] Helby v. Rafferty[406] and Carega Properties v. Sharratt[407] drawing negative responses while strong opposing positive views came from the English Court of Appeal.[408] In McIntosh v. Hennessy[409] the British Columbia Supreme Court sought not to extend the definition of "spouse" to include a cohabitee under the Family Relations Act.[410]

Eekelaar is of the opinion that the duration of the relationship is also most important:[411] the longer the

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[402]Supra, Burke v. Burke, n.313 and Supra, Tanner v. Tanner, n.301. Violence also present in, Williams v. Staite, [1978] 2 W.L.R. 825 (C.A.); Re Holiday, [1981] CH. 405 (C.A.) and Gordon v. Douce, [1983] 1 W.L.R. 563 (C.A.).

[403]Re Yale and McMaster, [1974] 3 O.R. (2D) 547 (ONT.H.C.).

[404]Supra, Horrocks v. Forray, n.269 and Supra, Dennis v. McDonald, n.346.

[405]Supra, n.341.

[406]Supra, n.338.

[407][1979] 1 W.L.R. 928 (H.L.).

[408]Hawes v. Evenden, [1953] 2 ALL E.R. 737 (C.A.); Supra, Dyson Holdings Ltd. v. Fox, n.301; Supra, In Re Ever's Trust, n.301 and Watson v. Lucas, [1980] 3 ALL E.R. 647 (C.A.).

[409](1981) 22 R.F.L. (2D) 392 (B.C.S.C.).

[410]R.S.B.C. 1979, c.121, s.1.

[411]John Eekelaar, Family Law and Social Policy, 2nd Ed., London: Weidenfeld & Nicolson, 1984, p.148.

relationship the more deserving the situation, especially in cases of support and maintenance to be discussed at a more appropriate place in this thesis.[112]

The question of the wife or cohabitee having the right to possession of "the home" by way of an "equitable license" was emphasized by Lord Denning in Bendall v. McWhirter[113] with respect to the conflicting rights of a deserted wife as against third parties. Lord Denning was of the opinion:[114]

> "In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her.... This authority flows from the status of marriage coupled with the fact of separation owing to the husband's misconduct."

The state of the law following this introduction of equitable licence and estoppel was extremely confused. The conflicting principles of contract law, matrimonial property law, trust law and the law of real property prompted Lord Cohen in National Provincial Bank v. Ainsworth to state, "The existing law is in an unsatisfactory state".[115] The problem in England[116] with the rights of deserted wives as

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[112] Infra, Chapter 6 - Support.

[113] [1952] 1 ALL E.R. 1307 (C.A.).

[114] Id. p.1311.

[115] [1965] A.C. 1175 (H.L.) at p.1228.

[116] Supra, Hardwick v. Johnson, n.306 and In Williams and Glyn's Bank Ltd. v. Boland and v. Brown, [1981] A.C. 487 (H.L.) contrast with Chaunce v. Chaunce, [1969] 1 ALL E.R. 722 (CH.DIV.); Cuzner v. Underdown, [1974] 2 ALL E.R. 351 (C.A.) - wife's misconduct, and Supra, Collin Smith Music Ltd. v. Ridge, n.338.
For mother and son complications see Bull v. Bull, [1955] 1 Q.B. 234.

against third parties was even more confused with the decision in Cooke v. Head[417] where not even cohabitation was found to be present but which nevertheless resulted in a one-half interest to a mistress. The series of cases that followed, finding that cohabitation resulting in license to occupy, was not contrary to public policy,[418] which required at least reasonable notice[419] and could result in the transfer of the fee simple to the female cohabitee[420] to a "life interest",[421] was, and is, complex and confusing. The Law Commission Report #115 Cmnd 8636 August 1982 recommended that coowner's rights be registered and required spousal consents in order to modify the effects of Bolland.[422] As Masson put it:[423]

> "Certainly to make this type of equitable interest enforceable against a third party purchaser who had no notice of it would give greater protection to an equitable owner than other non-legal owners have"

Unfortunately, the recommendations were removed leaving Boland still good law in England. Canada on the other hand appears to have followed the edicts contained in National

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[416](cont'd)
[417]Supra, n.288.

[418]Somma v. Hazelhurst, [1978] 2 ALL E.R. 1011 (C.A.).

[419]Supra, Chandler v. Kerley, n.307.

[420]Supra, Pascoe v. Turner, n.337.

[421]Supra, Greasley v. Cooke, n.357.

[422]Supra, n.416.

[423]Judith Masson, "No More Property Rights of Cohabitees" (1985), 15 F.L. 233 at p.233.

Provincial Bank v. Ainsworth with respect to the rights of a deserted wife. Stevens v. Brown[424] and Re Smyth and Smyth[425] confirmed that the right of a deserted wife is a "personal right" as against the husband and cannot run with or encumber land. This issue was affirmed with Royal Bank of Can. v. Nicholson[426] when the court held a motgagee has prior rights, stating the right of the wife "...cannot be greater than that of her husband..." Holland concludes:[427]

> "At common law a wife has the right to occupy the matrimonial home by virtue of her right to the husband's consortium."

A cohabitee is at best a bare licensee and consequently when notice to quit is given must leave the premises within a "reasonable time." Where a valid common law marriage is held, it is argued the courts should find in favour of a legal marriage. Having argued this point, contrasting the Tanner decision with the Canadian apparent position, such would result in a mistress in England having greater rights that a wife in Canada,[428] leaving the cohabitee in a most precarious position.[429]

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[424](1969) 2 D.L.R. (3D) 687 (N.S.S.C.).

[425](1969) 1 O.R. 617 (ONT.H.C.).

[426](1980) 29 O.R. (2D) 141 (H.C.). See also, Mankewycz v. Mankewycz (1973), 13 R.F.L. 210 (ONT.C.A.) - referred back to the trial judge for disposition of the issue of "desertion".

[427]Supra, Holland, N.172 at p.74.

[428]Supra, Cooke v. Head, n.288 and Supra, Eves v. Eves, n.289.

[429]see, Molodowich v. Penttinen (1980), 17 R.F.L. (2D) 376 (ONT.DIST.CO). Cohabitee deemed a "spouse" because "...she

E. Support for Cohabitees and Their Children

During Cohabitation

Support for cohabitees and their children is, to say the least, a confused state of affairs. In cases where the court have held cohabitation akin to marriage on the basis of duration of the relationship and presence of children, there appears to be a strong impetus to award support on a somewhat equal basis. As MacDougall points out, Becker v. Pettkus is narrowing the gap between marriage and cohabitation:[430]

> "True, a person will not acquire any legal rights to maintainance from a short period of cohabitation but the modern tendency is to limit the rights acquired in a marriage of short duration."

Although stating the position in England, Johnson might seemingly to be addressing the situation in Canada:[431]

> "In England legal rights and obligations of cohabitees towards each other are determined by a mixture of judicial discretion exercised in the courts and a hotchpotch of unrelated and unco-ordinated legislation."

As Harpum concluded:[432]

> "What is required is a broad statutory discretion...because the situations that exist are far more varied to adjust the rights of the

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[429](cont'd) felt like a married person...".

[430]Supra, n.253 at p.317.

[431]Robert Johnson, "Cohabitation Without Formal Marriage in England and Wales" (1986), 16 FAM. LAW 47.

[432]Charles Harpum, "Adjusting Property Rights Between Unmarried Cohabitees" (1982), 2 OXFORD J. OF LEGAL STUDIES 287 at p.287.

cohabitees when they cease to live together."

It is reasonably clear that at common law there is no duty to support if the courts do not find a "marriage like" relationship.[433] Cohabitees are treated at law as strangers[434] and are liable to support themselves[435] with the possible exception of "necessities".[436] As Holland points out this obligation to become self supporting also applies to married persons[437] as in Taylor v. Taylor [438] unilaterally affirming the cohabitee's tenuous position.

Upon Separation

Legislative enactments[439] have made substantial changes in rights of cohabitees, particularly in Ontario. With the advent of new legislation[440] it is to be hoped that difficulties in conflicting interpretations in the area of time periods for application,[441] continuousness of the five

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[433]Supra, Colin Smith Music Ltd. v. Ridge, n.338; Supra, Chandler v. Kerley, n.307 and Supra, Richards v. Dove, n.307.

[434]Supra, Diwell v. Farnes, n.290 and Supra, Parry, n.371 at p.36.

[435]Supra, Oliver, n.367 at p.99.

[436]Supra, Gallen et al., n.19 at p.15.

[437]Supra, Holland, n.172 at pp.99-100.

[438](1979) 6 R.F.L. (2D) 341 (ONT.U.F.C.).

[439]Infra, Chapter 7.

[440]Supra, n.323.

[441]Donheim v. Irwin (1978), 6 R.F.L. (2D) 242 (ONT.PROV.CT.); Fromovitz v. Fromovitz (No.2) (1979), 26 O.R. (2D) 400 (ONT.S.C.) further proceeding 16 R.F.L. (2D)

year period[442] and the "intention" to end the relationship controversy,[443] are rectified. In an application under the Wives' and Children's Maintenance Act,[444] the Manitoba Court of Appeal in deciding what constituted a "period of one year or more"[445] held an intermittent relationship of five years wherein the longest period had been nine months, sufficient to sustain a maintenance award. Legislation will be dealt with in detail at a more appropriate part of this thesis.

In England, the courts have had difficulties in deciding whether or not to take into consideration the period of cohabitation before marriage when deciding awards of maintenance upon separation. In Chaterjee v. Chaterjee[446] the Court of Appeal upheld a lump sum maintenance award on the basis that the claimant had "reasonable expectations."

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[441](cont'd) (ONT.H.C.) and Re Feehan and Attwells (1979), 24 O.R. (2D) 248 (ONT.CO.CT.); Re Neiss and Beaman (1981), 24 R.F.L. (2D) 169 (ONT.H.C.) and Ternoey v. Goulding (1981), 23 R.F.L. (2D) 9 (ONT.CO.CT.) (1982) 35 O.R. (2D) 29 (ONT.C.A.).

[442]See Opposing decisions Stoikiewicz v. Filas (1978), 21 O.R. (2D) 717, 7 R.F.L. (2D) 336 (ONT.U.F.C.); Kossakowski v. Sierchio (1983), 36 R.F.L. (2D) 395 (ONT.CO.CT.); Re McDiarmid and Anderson (1979), 1 F.L.R.A.C. 575 (ONT.PROV.CT.); Sanderson v. Russell (1979), 9 R.F.L. (2D) 81 (ONT.C.A.); Armstrong v.Thompson (1979), 23 O.R. (2D) 421 (ONT.S.C.); Illingworth v. Hyatt (No.1) (1984), 1 F.L.R.A.C. 128 (ONT.PROV.CT.) and Supra, Molodowich v. Penttinen, n.429.

[443]Dicks v. Zavitz (1979), 13 R.F.L. (2D) 179 (ONT.PROV.CT.) and Re Harris and Godkewitsch (1983), 41 O.R. (2D) 779 (ONT.PROV.CT.).

[444]R.S.M. 1970, C. W-170.

[445]Id. s.6(a).

[446](1976) 6 FAM. LAW 83 (C.A.).

The decision in Kokosinski v. Kokosinski[447] clearly demonstrates that in a relationship of twenty six years, wherein twenty five years were cohabitation, the court had little difficulty in awarding a lump sum maintenance award in order to accomplish what was "fair", "just and reasonable". One important factor appeared to be that cohabitation was after a divorce and further involved extensive business involvements together with the presence of a child of the union. Such consideration was not extended in Campbell v. Campbell[448] wherein it was expressly decided that three and a half years of cohabitation should not be taken into consideration in assessment of maintenance in a short two year marriage. Likewise, similar consideration was apparent in a two months marriage, where the six years of prior cohabitation was regarded as a period of "up and down", "on and off" relationship.[449] In Foley v. Foley[450] cohabitation prior to marriage was considered to be relevant, but only as one consideration of many, and which should not be equated or equal to, the duration of the years in marriage. Barton commenting on the case stated:[451]

> "The duration of the marriage is always relevant...A period of living together before marriage is not

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[447] [1980] 1 ALL E.R. 1106 (FAM.DIV.).

[448] [1977] 1 ALL E.R. 1 (FAM.DIV.).

[449] Hayes v. Hayes (1981), 11 FAM. LAW. 208 (FAM.DIV.).

[450] [1981] 2 ALL E.R. 857 (C.A.).

[451] Chris. Barton, "Note on Foley v. Foley, [1981] 2 ALL E.R. 857" (1982), THE LAW TEACHER 58.

> normally to be seen as notionally lengthening of marriage. This is because public policy requires that mutual obligations begin only on marriage."
>
> "The Court will be influenced by what went on before marriage when it is necessary in order to do justice between the parties, e.g., where they were not free to marry earlier in their relationship...where the Court, in the exercise of its discretion, does acknowledge the "live-in" period it will not necessarily be given the same weight as would a similar period of marriage."

Oliver,[452] discusses maintenance for cohabitees and children of the relationship in terms of social and moral duty which normally are not legally enforceable in a court of law. Whether such duties "should be" taken into consideration is a question of policy. As Zuckerman observes:[453]

> "The position emerging so far is one of legal awareness of the informal family as a source of certain legal consequences as a matter of substance, but - it might be argued - the details of this position are patchy and accidental and that, consequently, a new and clear policy and a comprehensive reform are required"

Such reform appeared to be embodied in Roberts v. Roberts[454] where "moral" obligations emanating from a cohabitation relationship were taken in consideration at the trial level but overturned on appeal. The learned Justice stated that the "new circumstance" was relevant but should not circumvent the rights of the wife. In stating, "...the just claims of the wife and the child of the marriage have

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[452] Supra, Oliver, n.367 at pp.96-99.

[453] Supra, Zuckerman, n.309 at p.274.

[454] [1968] 3 ALL E.R. 479 (P.D.& A.) See also, Re. E., [1966] 1 W.L.R. 709 (CH.DIV.).

been virtually ignored"[455] the court in effect denied the male cohabitee of "second chance". Conversely, courts in England[456] and Canada[457] are reluctant to alter maintenance awards to wives when they cohabit after marriage breakdown.

Cohabitees, of course, may bring Affiliation Proceeding for maintenance of the mother and child. Freeman & Lyon see such activity as reducing the distinction between legitimate and illegitimate, thereby supporting current legislative policy.[458]

It is extremely difficult to discern any clear cut pattern or trend. Even where an Act has expanded the definition of "spouse"[459] in order to confer benefits on cohabitees, the courts appear reluctant to move into the area on a liberal basis. In a bewildering case, a British Columbia County Court struck down a support agreement between cohabitees after ten years of cohabitation finding "no cohabitation" even where there was a child of the relationship.[460] The apparent "modern life style" of independent activities or alternatively lack of

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[455]Id. Roberts v. Roberts, p.486.

[456]Trippas v. Trippas, [1973] 2 ALL E.R. 1 (C.A.).

[457]Caldwell v. Caldwell (1978), 1 F.L.R.A.C. 143 (ONT.DIST.CT).

[458]Supra, Freeman & Lyon, n.181 at p.69.

[459]Re Proc. (1975), 19 R.F.L. 82 (ONT.S.C.).

[460]Bellis v. Innes (1981), 21 R.L.F. (2D) 40 (B.C.CO.CT.) and Supra, Kizko v. Bacyzski, n.298. See also, G.H.L. Fridman, The Law of Contract in Canada, Toronto: Carswell, 1976, p.333.

"interdependence" was also the basis for a Nova Scotia County Court decision.[461]

Keene,[462] Holland[463] and Eekelaar[464] appear to be of the opinion the courts should not be looking at cohabitation as a "status" but rather consideration should be based upon the economic needs of the applicant. Although an interim application for maintenance was disallowed,[465] at least in one jurisdiction, it appears that following the leading American decision in Marvin v. Marvin, Canadian courts will look towards the "rehabilitation" concept and award maintenance on a short term basis until parties are able to maintain themselves. This position applies to both in breakdown in cohabitation[466] as well as marriage.[467]

Upon Death

Apart from Tanner v. Tanner,[468] it is reasonablly clear that a cohabitee's claim, unless specifically named as a beneficiary in a probated will, will at common law be struck

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[461]Jansen v. Montgomery (1982), 30 R.F.L. (2D) 332 (N.S.CO.CT.).

[462]Judith Keene, "Domestic Contracts Between Cohabiting Couples" (1978), 1 CAN. J. FAM. L. 477 at p.483.

[463]Supra, Holland, n.172 at pp.100-102.

[464]Supra, Eekelaar, n.411.

[465]Routley v. Dimitrieff (1982), 36 O.R. (2D) 302 (S.C.).

[466]Wonch v. Sakeris (1978), 1 F.L.R.A.C. 247 (ONT.PROV.CT.).

[467]Long v. Long (1982), 28 R.F.L. (2D) 145 (MAN Q.B.).

[468]Supra, Tanner v. Tanner, n.301.

down. This appears to be the case even though a claim may have been actionable for necessaries before death,[469] although there have been abberations based on hardship[470] and compassion.[471] Recent English decisions[472] in striking down cohabitee's claims for support upon death, appears to be compatible with the reasoning of the British Columbia Supreme Court in both male[473] and female[474] cohabitees claims upon death of their partners. In Louis v. Esslinger,[475] the same jurisdiction dismissed a female cohabitee's claim but upheld a claim for support of a dependent child who stood in loco parentis to the deceased. It would appear that the hopes of Barton, J.L. will not be realized in the too distant future:[476]

> "Tanner v. Tanner is a striking illustration of the manner in which ancient and inconvenient principles

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[469] Blades v. Free (1829), 109 E.R. 63.

[470] Re Joslin, [1941] 1 ALL E.R. 302 (CH.DIV.) - a negligible estate.

[471] Re McC. (1979), FAM. LAW 26 - a small proportional award and Re Cooper (1980), 7 E.T.R. 118 (ONT.DIV.CT.) - where 75% passed to a former wife the court ruled the cohabitee's claim for the balance was sustained over the interests of greedy and "hostile" children.

[472] Supra, Foley v. Foley, n.450 and Kourkgy v. Lusher (1983), 4 F.L.R. 65 .

[473] Cummings et al. v. Fleming, [1980] 4 W.W.R. 688 (B.C.S.C.).

[474] Trowsdale (Thompson) v. Trowsdale (1980), 20 B.C.L.R. 1 (S.C.).

[475] Supra, n.52.

[476] J.H. Barton, "Note on Tanner v. Tanner, [1975] 1 W.L.R. 1346" (1976), 92 LAW Q. REV. 168.

> which it is not practical to abolish outright can be largely circumvented, and we should be thankful that the common law retains so great a degree of flexibility. A state of affairs in which the court was entitled to award remuneration to a mistress on her protector's death, but could do nothing for her during his life would have been much less to the credit of the law."

F. Custody, Access and Adoption of Children

Custody

The courts have total and absolute power in the matter of custody of children in legal marriages, common law marriages and cohabitation relationships. Such power is discretionary and is always subject to review based upon changing circumstances affecting the welfare of the child. Illustrative of the underlying principles of such discretion is Lord Simonds statement in McKee v. McKee:[''']

> "...the welfare and happiness of the infant is the paramount consideration in question of custody.... To this paramount consideration all others yield."

In the majority of cases in marital disputes the courts have held, under the doctrine of "parens patriae" or by statute,[''''] that generally, it is in the best interest of the child to award custody to the wife with liberal access to the husband[''''] even where there is evidence of adultery

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['''][1951] 1 ALL E.R. 942 (P.C.) at P.947.

[''']For an interesting discussion on the delicate legal difference, see Christine Davies, "Custody and Adoption: Some Interrelated Problems" (1973), 23 U. of T. L. J. at p.101.

[''']S.P. Khetarpal, "Family Law" (1977), 10 OTTAWA L. R. 384. See also, Re Stroud and Stroud (1974), 48 D.L.R. (3D) 527

on behalf of the wife.[410] There are notable exceptions regarding adultery[411] as well as in the case of the wife's desertion[412] and other "fault" related factors.[413]

This apparent built in bias of the courts to favour the wife is even more strongly applied in cohabitation situations. Parry, concisely states the father's position:[414]

> "In reality it is often difficult for a father of a legitimate child to obtain custody and it has proved even more difficult for a father of an illegitimate child to do so, on the basis that such a father has no parental rights."

In Bell v. Bell[415] the Ontario Court of Appeal echoed this position in rather antiquated language:[416]

> "No father no matter how well-intended or how solicitous for the welfare of such a child, particularly a little girl, turns to her mother in her troubles, her doubts and her fears. In that respect nature seems to assert itself. The feminine touch means so much to a little girl; the frills and the flounces and the ribbons in the matter of dress; the whispered consultations and the confidences on

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[407](cont'd) (ONT.H.C.) and Stokes v. Stokes (1974), 19 R.F.L. 326 (ONT.H.C.) for a case where access to the husband withheld with qualifications.

[410]Hill v. Hill (1975), 19 R.F.L. 119 (ONT.C.A.).

[411]Clark v. Clark (1952), O.W.N. 671 (ONT.H.C.). See also, MacDonald v. MacDonald (1976), 21 R.F.L. 42 (S.C.C.).

[412]Rennie v. Rennie (1973), 29 D.L.R. (3D) 205 (P.E.I.S.C.) and Talsky v. Talsky (1973), 11 R.F.L. 226 (ONT.C.A.).

[413]As to homosexual behavior see: Case v. Case (1974), 18 R.F.L. 132 (SASK.Q.B.).

[414]Supra, Parry, n.371 at p.106.

[415][1955] O.W.N. 341 (ONT.C.A.).

[416]Id. p.344.

> matters which to a child's mind should only be discussed with Mother; the tender care, the soothing voice; all these things have a tremendous effect on the emotions of the child."

In England[397] and Canada[398] the law has consequently treated the male cohabitee as little more than a "stranger" category. The mother's right is not absolute but, rather is in the nature of a prima facie right[399] and is therefore entitled[400] to custody. The apparent exception to such right and entitlement is where the mother abrogates her rights by abandoning the child.[401] Mere transfer of such right[402] does not constitute abandonment although "transfer" coupled with sexual misconduct on behalf of the natural mother[403] or her new cohabitee[404] may result in disentitlement. Lack of economic means[405] evidence of immoral conduct[406] of even

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[397]Supra, Barton, n.176 at p.24. See also, Re G., [1956] 1 W.L.R. 911 (C.A.).

[398]A.L. Foote, "Family Organization and the Illegitimate Child" reprinted in: D. Mendes da Costa, Studies in Canadian Family Law, VOL.1, Toronto: Butterworths, 1972, p.52.

[399]Re Logue and Burrell (1971), 15 D.L.R. (3D) 129 (ONT.C.A.).

[400]McNeilly v. Agar, [1958] S.C.R. 52.

[401]Re Lou and Children's Aid Society (1971), 23 D.L.R. (3D) 454 (N.S.S.C.).

[402]Re Leeson (1971), 5 R.F.L. 46 (B.C.S.C.).

[403]Re Lewis (1967), 61 W.W.R. 418 (B.C.S.C.).

[404]Misfeldt v. Chowen (Shapansky) (1973), 35 D.L.R. (3D) 543 (SASK.Q.B.). First case in Saskatchewan to award custody to a putative father.

[405]Vandenberg v. Guimond (1968), 1 D.L.R. (3D) 573 (MAN.C.A.) and Re Staples (1971), 6 R.F.L. 278 (B.C.S.C.).

[406]Philpott v. Philpott, [1954] O.R. 120 (ONT.C.A.).

physical abuse[497] will not terminate such right unless the common law is modified by statute.[498] Where it is proven that a mother is unstable and dishonest contrasted against "strong affection" and stability on behalf of the male cohabitee the courts have awarded custody to the putative father.[499]

The putative father is further faced with the problem of jurisdiction. That is, does he have status before the courts to even commence an action for custody of his child? In Ontario, the Re Crespy[500] decision stated that no status existed; such position was distinguished in C. v. Q.[501] reemphasizing the courts rights to decide the issue without reference to status but rather on the grounds of the prerogative rights under the parens patriae doctrine. Citing McKee v. McKee with approval Pennell, J. states:[502]

> "The decision in Re Moores and Feldstein gives new strength to the principle that the welfare of the child is to be the paramount consideration even in custody cases involving illegitimate children."

The jurisdiction problem appears not to be a problem in Saskatchewan[503] but in Alberta the issue was

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[496](cont'd)
[497]Rego v. McGillis (1978), 6 R.F.L. (2D) 273 (SASK.Q.B.).

[498]Re Sheppard (1972), 5 R.F.L. 371 (N.S.CO.CT.) and Houle v. Morisette (1974), 19 R.F.L. 380 (ONT.SURR.CT.)

[499]Pritchard v. Bear (1980), 17 R.F.L. (2D) 168 (SASK.Q.B.)

[500](1970) 3 R.L.F. 124 (ONT.C.A.).

[501](1976) 29 R.F.L. 44 (ONT.H.C.).

[502]Id. p.51.

[503]Supra, Misfeldt v. Chowen (Shapansky), n.494 at p.551.

side-stepped.[304] In the interperation of "child" and "parent" under the Family Court Act, R.S.A. 1970, c.133. McDermid, J.A. appears to want to expand the jurisdiction of the family court to include illegitimate children, but then, leaves that decision to remain unanswered;[305]

> "...I think it more consonant with the object of the statute that illegitimate children be included than excluded."
>
> "The question as to whether the Family Court has jurisdiction as to the custody of an illegitimate child I leave for further argument if the matter is in dispute between the parties."

Similar reluctance was evident in Manitoba in Wong v. Graham[306]

> "The Family Maintainance Act has not equalized the position of mother and father and vis-a-vis their illegitimate children. To some that may seem regrettable, but it is not open to this Court to invent provisions that do not exist."

As Holland points out, all the provinces (except Newfoundland), have now given the status of legitimacy as from birth,[307] which would appear to remedy such unconscionable decisions. Barber, in a passionate plea for more equitable treatment of the putative father stated:[308]

> "The very obvious fact that for every unwed mother there is an unwed father [who] has been virtually

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[303](cont'd)

[304]White v. Barrett (1973), 10 R.F.L. 90 (ALTA.C.A.).

[305]Id. p.97.

[306](1979) 1 MAN.R. (2D) 365 (PROV.CT.) at p.371.

[307]Supra, n.172 at p.168.

[308]D.F. Barber, Unmarried Fathers, London: Hutchinson & Co., 1975, p.115.

> ignored by social agencies and the helping professions. We have failed to see him as a person with feeling, sensitivities, in need of help. We have wrongly assumed that he is not concerned with the woman he impregnates or her offspring."

Fodden, supports this position, citing a study of sixty eight(68) unmarried couples who were free to marry, in which only twelve (12) men refused to marry. He stated:[509]

> "The putative father, still being relatively unknown, is held to some extent by agencies to be an irresponsible and uncooperative person and, as such, not worthy of much consideration."

In a world that is experiencing an epidemic of out of wedlock births,[510] probably as a result of increased cohabitation, it is not surprising that the Alberta Survey,[511] indicated that there was a high degree of concensus among the respondents that unmarried fathers should have the same legal rights as unmarried mothers. Such data seem to reflect a modern concern, as yet, not even thoroughly judicially considered.

Access

It is very rare that a mother will be denied access to her child. However, where the court feels that the "visits would be confusing and not psychologically good for the child,"[512] the court will exercise its discretion against

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[509] Supra, Fodden, n.119 at p.6-72.

[510] Supra, Eekelaar, n.411 at p.10.

[511] Supra, The Institute of Law Research and Reform, Edmonton, Alberta, n.187 at p.88.

[512] Podolsky v. Podolsky (1977), 26 R.F.L. 321 (MAN.Q.B.).

the mother.

The putative father's position is steeped in uncertainty. It would appear that where he has supported the female and the child[113] or where it would be of a "psychological" benefit[114] to the child the court would grant access. Where custody of the child is already with the father such will increase his chances,[115] as will a relationship of "some permanance."[116] In Ontario the courts have been especially harsh towards the putative father, stating his only right is to "pay support."[117] In Reynolds v. Toi[118] access was denied even where the putative father had been devoted to his child, having continuous access of over two and a half years. In a callous decision based on faulty reasoning the judge was of the opinion that:[119]

> "His insistence on maintaining a constant relationship with his child will in the future be a probable source of embarrassment to the child and a serious interference with her stable and secure development in her mother's home."

Keith, J. then concluded such absurd reasoning with spurious irrelevance:[120]

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[113] S. v. O. (1978), 8 FAM. LAW 11 (HIGH CT.FAM.DIV.).

[114] Sobel v. Fogler (1972), 6 R.F.L. 198 (ONT.S.C.).

[115] Sobanski v. Sobanski (1973), 9. R.F.L. 318 (ONT.H.C.).

[116] Abell v. Casselman (1979), 1 F.L.R.A.C. 449 (ONT.P.C.)

[117] Re Dubeau (1969), 4 D.L.R. (3D) 232 (ONT.CO.CT.).

[118] (1975) 21 R.F.L. 171 (ONT.H.C.).

[119] Id. p.173.

[120] Id. p.173.

> "In the normal course of human affairs the defendant will himself marry and have his own family unit with children."

More reasonable grounds for disallowing access were "apprehended harm"[521] and where the putative father was deemed a "rootless man" on the basis of drinking, gambling and mental problems.[522]

The courts, when considering what is in the "best interest of the child" often overlook the obvious as indicated by Bissett-Johnson:[523]

> "Not only is the welfare of the child the paramount consideration in access as well as custody, but increasingly the courts are realizing that access is a right of the child and not a right of the non-custodial parent..."

Adoption

The adoption process, even for married couples, is extremely difficult. There are too many potential adoptive parents and too few available babies, which has been the breeding ground for "black-market" babies, a disgusting state of affairs supported by some unscrupulous lawyers but thankfully denounced by highly ethical members of the legal profession.[524] Consequently, it is not difficult to realize

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[521] Boileau v. Boileau (1979), 13 R.F.L. (2D) 275 (ONT.DIV.CT.).

[522] M. v. J. (1978), 8 FAM LAW 12.

[523] Alastair Bissett-Johnson, "Children in Subsequent Marriages - Questions of Access, Name, Adoption" reprinted in J.M. Eekelaar & S.N.Katz (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworth, 1980, p.383.

[524] Opinion of the Ethics Commitee, Law Society of Alberta,

that adoption is not available to cohabitees,[525] although a natural mother may adopt her own child.[526] Parry concisely states the situation in England,[527] which it is submitted is representative of Canada:

> "...so cohabitees cannot jointly adopt their own child, the child of one of them, or any other child."

In England, the right of a putative father under the usual definition of "parent" does not include an illegitimate father[528] and the advantages of legitimizing a child outweigh any potential rights of the natural father,[529] unless special circumstances of apparent racial considerations warrant access being allowed to a natural father.[530]

In Canada, under legislative enactments, to be discussed in the appropriate segment, theputative father is a necessary part of the adoption proceeding[531] especially if the father has supported the child or the child has resided

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[524](cont'd) expressed by its chairman to the writer, September 11, 1986.

[525]Supra, Barton, n.176 at p.25.

[526]Supra, Foote, n.488 at p.51.

[527]Supra, Parry, n.371 at p.110.

[528]Re. M (An Infant), [1955] 2 ALL E.R. 911 (C.A.).

[529]Re E (P) (An Infant), [1979] 1 ALL E.R. 323 (C.A.).

[530]Re J. (A Minor) (Adoption Order: Conditions), [1973] 2 ALL E.R. 410 (HIGH CT., FAM.DIV.).

[531]Supra, Foote, n.488 at p.51

with him.[532] Consequently, a putative father has the right to notice of wardship hearing, based on a split decision as exemplified in Childrens' Aid Soc. of Metro. Toronto v. Lyttle.[533]

In Re Liffiton et al. and Campbell,[534] the Ontario Court of Appeal held that where a father was behind in maintenance payments and showed little or no interest in visiting his child, the consent was dispensed with. Even in marital disputes, consents to the natural mother are required[535] except in one exceptional circumstance, which was the subject of a strong dissent.[536] In cases of illegitimacy the natural mother's consent will be dispensed with where there are "serious and important reasons"[537] or where granting the consent will would have disrupted "stability and authority"[538] in a new marriage.

The largest area of contention appears to be the rights of the natural mother as against third parties. In Martin v.

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[532]Id. p.52. See also, Re Kennette and Munroe, [1973] 3 O.R. 156 (ESSEX CT.CT.), a beautifully reasoned decision, especially at pp.166-169.

[533](1973) 34 D.L.R. (3D) 127 (S.C.C.).

[534][1972] 2 O.R. 592 (ONT.C.A.).

[535]Re Desmarais, [1969] 1 O.R. 700 (ONT.C.A.) and Smith v. Harvey (1974), 19 R.F.L. 367 (ONT.C.A.).

[536]Re Sharp and Waldron v. Adams (1962), 36 D.L.R. (2D) 328 (B.C.C.A.) at p.334.

[537]Re Gardiner (1976), 4 R.F.L. (2D) 394 (ONT.C.A.).

[538]Re Children of Alexandra Edith Carter (1976), 15 N.S.R. (2D) 181 (N.S.C.A.).

Duffell[539] the court was of the opinion that:

> "It is, I think, well settled that the mother of an illegitimate child has the right to its custody, and that apart from statute she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her."

The Supreme Court of Canada, returned the child to the natural mother even when the mother had surrendered the custody of the child voluntarily. The foster parents were similarly denied custody in Hepton v. Maat[540] as did the same court in Re Mugford.[541] Davies, is of the opinion that the decision in the Baby Duffell case places too much emphasis on the prima facie right of the natural mother:[542]

> "Re Baby Duffell has succeeded in imposing a straightjacket on the development of this branch of the law in other Canadian provinces as well as in Ontario itself."

Davies, prefers to support the reasoning of the Ontario Court of Appeal in Re Fulford and Townsend[543] where the court awarded custody to the putative father's sister stating the natural mother's right was not absolute, reaffirming that the welfare of the child is the "paramount" consideration.

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[539][1950] S.C.R. 737 at p.744.

[540][1957] S.C.R. 606.

[541][1970] 1 O.R. 610 (S.C.C.).

[542]Supra, Davies, n.478 at p.177.

[543](1971) 19 D.L.R. (3D) 638 (ONT.C.A.).

Hughes[544] and Bissett-Johnson[545] reflect the two opposing viewpoints:

> "The recurring reference to the principle of the paramountcy of the welfare and interests of the child contained in the adoption legislation of many of the provinces and territories today is misleading. Although only an adoption that is in the child's best interests will be allowed, adoption cannot be considered by the courts as a means of furthering the welfare of the child until the rights of the natural parents in the child either have been surrendered voluntarily or have been forfeited through parental misconduct"

> "Despite the opposition of the custodial parent and their desire to be free of court interferences the courts have a residuary role in encouraging children to retain legal ties with both parents.... As long as adoption severs legal ties with natural parents, the old fallacy of the blood-tie creating an automatic right of access must not be replaced by the new heresy of the propriatory rights of the custodial parent."

Weiler and Berman[546] point out the importance of deciding quickly on custody matters in their research study that "followed up" on custodial disputes five years after judicial decision. In disputes settled within the first three months of the child's life, no psychological effects are present, whereas three to six months showed "appreciable distress", and six to twelve months evidenced "marked distress." The researchers were of the opinion:[547]

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[544]Margaret E. Hughes, "Adoption in Canada" reprinted in: D. Mendes da Costa, Studies in Canadian Family Law, VOL.1, Toronto: Butterworths, 1972, P.177.

[545] Supra, Bissett-Johnson, n.523 at p.392.

[546]K.M. Weiler & G. Berman, "Re Moores and Feldstein - A Case Comment and Discussion of Custody Principles" (1974), 12 R.F.L. 294 at p.294.

[547]Id. pp.305-306.

> "If we consider with due seriousness the settlement of custody disputes in the best interest of the child, then we must give lower priority to the blood tie. It is unwarranted to promote the fallacy that the biological parents will be better than the foster parents of an adoptive parent."

Two cases supporting such position were J. v. C.[342] and Nelson v. Findlay[343] where the court awarded the child to third parties over the right of both natural parents, the latter evidencing the tenuous position of the putative father. As Parry points out,[344] upon the death of the mother the father gains no interest with respect to custody, guardianship, or access unless conferred by the court.

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[342][1970] A.C. 668 (H.L.).

[343][1974] 4 W.W.R. 272 (ALTA.S.C.).

[344]Supra, Parry, n.371 at p.110.

VII. Statutory Provisions, or Lack Thereof:

A. Federal

Fridman, when addressing the rising criticism against the "implied doctrine" in contract law for married persons, appeared to have capsulized the important role of legislatures are playing, and indeed must play, in recognizing the need to enact legislation that will result in more equitable treatment of the legal dilemna arising from cohabitation:[551]

> "...the more modern approach to family arrangements, at least when they affect husband and wife and certain kinds of matrimonial property (although common law developments may be in the process of being undertaken and outflanked, in Canada as well as England, by statutory change), may reinforce such criticism."

A reflection of such need to establish a more equitable base for cohabitees is found in the Canada Pension Plan, 1970, c.C-5[552] Section 63(2) states:

> "For the purpose of this Part, where a person
>
> (a) establishes to the satisfaction of the Minister that he had, for a period of not less than 3 years immediately before the death of a contributor with whom he had been residing and whom by law he was prohibited from marrying by reason of a previous marriage either of the contributor or of himself to another person been publicly represented by the contributor as a spouse of the contributor, or..."
>
> (b) establishes to the satisfaction of the Minister that he had, for not less than one year immediately before the death of a contributor with whom he had been residing, been publicly represented by the

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[551] Supra, Fridman, n.460 at p.33.

[552] As amended S.C. 1974-75, C.4, s.63(2)(a)(b).

> contributor as the spouse of the contributor, and that at the time of the death of the contributor neither he nor the contributor was married to any other person, that person shall if the Minister so directs, be deemed to be the surviving spouse of the deceased contributor..."

The Act specifically covers both types of cohabitation, one wherein there is a legal impediment and consequently could not evolve into a common law marriage, and cohabitation which involves "single-status" cohabitees for which the status of the common law marriage is entirely possible, if they so choose. It is interesting to note that the Act is silent on the rights under the duly constituted common law marriage. Presumably, section 63(2)(b) would be implimented to cover the situation although on a strict literal interpretation of the section, the outcome would be inconclusive.

The discretion to allow for the payment of benefits rests solely in the Director, which might give rise to concern on behalf of cohabitees living together under a legal disability. The three year period under section 63(2)(a) will hopefully be reduced to a period of one year in conformity to the provisions of the new Divorce Act.[333]

Several other federal statutes affect the position of cohabitees but not always directly. The Indian Act[334] confers status only on legal marriages and not cohabitation, although section 48 subsection 16 states:

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[333]S.C. 1986, c.4.

[334]R.S.C. 1970, c.I-6, and amendments thereto.

> "In this section, "child" includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom."

Under the Family Allowance Act,[555] a "parent" is defined as "an individual...who wholly or substantially maintains that child." Consequently, a family allowance is payable whether or not the parties are legally married or merely cohabitees.

The Income Tax Act,[556] has numerous sections which may affect the relationship of cohabitees, however, as previously stated, such is outside the scope of this thesis. Reference to Chapter 9 in Holland's text[557] written by D. Keith McNair, is highly recommended.

In the area of bankruptcy, the position of the cohabitee is reasonably clear. Since there is no definition of "spouse", and section 3 of the Bankruptcy Act[558] refers to "related persons" when considering reviewable transactions, it would appear that transfer between cohabiting couples are not capable of being set aside. The position of the common law spouse, lacking an express definition, would appear also to be excluded from consideration of a "non-arm's length transaction" with respect to a reviewable transaction. However, transactions

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[555]R.S.C. 1970, c.F-1, am. S.C. 1973-74, c.44, s.2(1).

[556]R.S.C. 1970, c.I-5, and amendments thereto.

[557]Supra, Holland, n.172 at p.187.

[558]R.S.C. 1970, c.B-3.

between non-married persons may be deemed fraudulent, the consequence of which may invoke the penalty sections.[559]

The Criminal Code[560] provides for protection for "necessaries" and appears to cover the legal marriage, common law marriage and cohabitation. Section 197(4)(a) states:

> "(4) For the purpose of proceedings under this section,
> (a) Evidence that a man has cohabited with a woman or has in any was recognized her as being his wife is, in the absence of any evidence to the contrary, proof that they are lawfully married."

Section 23(2)(3) and Sections 289(1)(2) deal with being an accessory after the fact and, in the opinion of the writer, could conceivably be oppressive to a common law spouse whose marriage is not held to be legal.

> 23(2) No married person whose spouse has been party to an offence is an accessory after the fact to that offence by receiving, comforting, or assisting the spouse, for the purpose of enabling the spouse to escape.
>
> 23(3) No married woman whose husband has been party to an offence is an accessory after the fact to that offence by receiving, comforting, or assisting in his presence and by his authority any other person who has been a party to that offence for the purposes of enabling her husband or that other person to escape.
>
> 289(1) Subject to subsection (2), no husband or wife, during cohabitation, commits theft of anything that is by law the property of the other
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> 289(2) A husband or wife commits theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything that is by law the

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[559] Supra, Pritchard, n.11 at p.143.

[560] R.S.C. 1970, c.C-34 and amendments thereto.

> property of the other in a manner that, if it were done by another person, would be theft.

These sections would appear not to cover cohabitees and cast grave consequences on the common law marriage. Likewise, the conspiracy section s.423, while not affecting transactions between husband and wife[561] would be far reaching for a common law marriage. Cohabitees would appear not to be protected under this section and could be open to charges of conspiracy.

Section 196 is somewhat of a danger to cohabitees as well as informal marriages. It states:

> "'form of marriage' includes a ceremony of marriage that is recognized as valid
> (a) by the law of the place where it was celebrated, or
> (b) by the law of the place where the accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated."

In a particularly harsh decision, Regina v. Howard,[562] a man was found guilty of bigamy where the "second" marriage had not even been consumated and where it was clearly a nullity under the marriage act. The learned judge concluded:[563]

> "Both counsel referred me to several cases dealing with the civil consequences of forms of marriage where there has been failure to comply fully with the Marriage Act, but in the view I take of the law these cases do not apply to ss.240 and 241 of the Cr. Code dealing with bigamy..."

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[561] Kowbel v. The Queen, [1954] S.C.R. 498.

[562] [1966] 3 C.C.C. 91 (B.C.).

[563] Id. p.93.

The provisions of the Canada Evidence Act,[564] previously discussed in relationship to Re Cote,[565] are unconscionable when such protection is not extended to a common law spouse, although, as Holland points out,[566] recommendations for abolishment of "privileged communication" would place legal marriage, common law marriage and cohabitation on the same footing. Equality achieved through the means of abrogating rights, to my mind, is somewhat unconscionable in itself.

B. Provincial

The response to cohabitation by the provincial legislatures has been sporadic and the lack of uniformity is clearly evident. Referring to "support obligations", Holland, in my opinion, graphically sums up the lack of consistency throughout all the varying types of legislative enactments:[567]

> "No overall objective is stated and there is no indication of how the various criteria are to be weighed. It reminds one of the provision of a recipe for a cake which lists ingredients without the specification of the appropriate amounts."

An analysis of each province's position on all the issues is clearly outside the scope of this thesis. Each of the jurisdictions could conceivably be the subject matter of

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[564] R.S.C. 1970, c.C-10 and amendments thereto.

[565] Supra, n.139.

[566] Supra, Holland, n.172 at p.186, footnote 22.

[567] Id. p.100.

many written works. For example, the Alberta Institute of Law Research and Reform has intensified research for over a decade without formally recommending changes, to any large degree, in existing or proposed legislation. Eminent scholars, such as Cruickshank,[568] MacNair,[569] Stone,[570] Fisher[571] and presently Davies,[572] have considered the ramifications of cohabitation in great detail. The complexities and intricacies of the subject matter are immense and perhaps the provincial legislatures are indeed prudent in taking a long hard look at cohabitation before attaching legal consequences to such a phenomenon. Needless to say, this thesis can only highlight legislative responses in a general way with specific reference in certain areas.

Property rights for cohabitees are thwart with uncertainty. As Holland points out, British Columbia opted out of granting specific rights to cohabitees based on

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[568]David Cruickshank, Living Together Outside of Marriage, Edmonton: Alberta Institute of Law Research and Reform, 1979.

[569]Deborah M. MacNair, Living Together Outside Marriage: A Position Paper, Edmonton: Alberta Institute of Law Research and Reform, 1980. See also, Proposal for an Empirical Study of People Who Live Together Outside Marriage, Edmonton: Alberta Institute of Law Research and Reform, 1981.

[570]Olive Stone, Living Together Ourside of Marriage Commentary, Report, Edmonton: Alberta Institute of Law Research and Reform, 1980.

[571]Donald G. Fisher et al., Living Together Survey of Edmontonions, Report, Edmonton: Alberta Institute of Law Research and Reform, 1983.

[572]Institute of Law Research and Reform, Edmonton, Alberta, Annual Report, 1984-1985 at p.41.

cohabitation for a period of not less that three years.[573] Such proposed legislation would have accorded a one-half interest in "family assets". Consequently, cohabitees are best protected by the common law application of "constructive trust" as applied in Pettkus v. Becker and more recently in Sorochan v. Sorochan.[574] In the latter case Chief Justice Beetz commented:[575]

> "In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimants deprivation and the property in question, the link need not always take the form of a contribution to the actual aquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may suffice."

With respect to occupation of the "home" the cohabitee, with the exception of British Columbia,[576] does not appear to have any statutory rights therein. The new Ontario Act[577] awaits judicial interpretation.

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[573] Supra, Holland, n.172 at p.41.

[574] Sarochan v. Sarochan, unreported, S.C.C., July 31, 1986. See also, Beard v. Beard, [1982] 1 S.C.R. 282 affirming (1980), 35 A.R. 448, varying (1978), 16 A.R. 271; Wilson v. Munro (1983), 32 R.F.L. (2D) 235 (ALTA.S.C.) and Pierce v. Timmins, unreprorted ONT.C.A. February 26, 1985.

[575] Id. p.14.

[576] Family Relations Act, R.S.B.C. 1979, C.121, s.52(2). See other relevant Provincial Acts:
Matrimonial Property Act, R.S.A. 1980, C.M-9;
Matrimonial Property Act, S.S. 1979, C.M-6, Part 1;
Matrimonial Property Act, S.N.S. 1980, C.9, s.11;
Family Law Reform Act, S.P.E.I. 1978, C.6, Part III.

[577] Supra, n.33.

Bala, believes that judicial discretion as opposed to statutory directives allows for consideration of the diversities within cohabitation and offers the following opinion:[577]

> "The absence of legislation is doubtless at least in part a reflection of the lack of political consensus on this controversial and highly visible issue."

Under the terms of the majority of the Wills Acts, unless the will is expressly declared to be made in contemplation of marriage within the document, the will is automatically revoked upon marriage; for example, the Wills Act[577] in Alberta. These sections would have no application to cohabitees as the act of cohabitation does not serve to revoke the will. Holland, recommends that to avoid problems in interpretation a cohabitee should be named specifically and not referred to as "spouse", "husband" or "wife".[580] Unfortunately, she fails to point out the inherent danger to the recipient cohabitee, in that the testator may revoke or change the will at any time prior to death or legal incapacity.

A rather precarious situation exists for cohabitees who live together free from legal incapacities to marry,while cohabiting, where one or both are not free to marry because of a subsisting marriage is expressly covered. This

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[577]Nicholas Bala, "Consequence of Separation for Unmarried Couples Canadian: Developments" (1980) 6 QUEEN'S LAW JOURNAL 72, p.123.

[577]R.S.A. 1980, c.W-11, ss.16-17.

[580]Supra, Holland, n.172 at p.122.

situation causes inequities within "cohabitation" itself. Section 9(1)(a) states:[581]

> 9(1) A will made by a person who is under age of 18 years is not valid unless at the time of making the will the person
> (a) is or has been married.

It would appear, on a literal interpretation of the section, that a person under 18 years of age who is free to marry, or indeed, living in a common law marriage, could not execute a valid will. Conversely, a minor who had previously been married, or who is already married to someone else, could execute a valid document.

Even in British Columbia where much legislative activity has been evident over the past decade, the Wills Variation Act,[582] appears not to affect cohabitees.

The Estate Administration Act[583] of British Columbia differentiates between a "common law spouse" and two years of cohabitation in Part V, s.86., although the body of provincial legislation provides little or no protection for the cohabitee upon death of the other spouse,[584] with certain exceptions.[585] It would appear therefore, that

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[581] Supra, n.579, Am. 1971, c.1 s.20(2).

[582] R.S.B.C. 1979, c.435.

[583] R.S.B.C. 1979, c.121. See also, Supra, Phipps v. Cartmill, n.393.

[584] E.g., Family Relief Act, R.S.A. 1980, c.F-2; Testators Family Maintenance Act, R.S.M. 1970, c.T50; The Testators Family Maintenance Act, R.S.N.B. 1973, c.T-4; The Family Relief Act, R.S.NFLD. 1970, c.124.

[585] E.g., The Dependants of a Deceased Person Relief Act, R.S.P.E.I. 1974, c.D-6 s.2(vi). Succession Law Reform Act, R.S.O. 1980, c 488, s.57(b) and s.57(d)(i). The Ontario Act

cohabitees have minimal protection in this area of the law. The area of support for cohabitees and children of the relationship, in Canada, is inconsistent, uncoordinated and in a discriminating state of affairs. The province in which the cohabitee resides will determine the extent of relief that society offers. In this area, Canadians are not equal. The legislature in British Columbia has been the most progressive and flies-in-the-face of the common law obligation to become self sufficient.[586] In the Family Relations Act,[587] part 4, s.57 provides for support obligations that are reciprocal based on an extended definition of "Spouse"[588] to cover cohabitation as "husband and wife" for a period not less that two years.

Under the Wives' and Children's Maintenance Act,[589] the Nova Scotia legislature reduced a five year period to one year[590] in an extended definition of "spouse" to cover cohabitation. Likewise, in Manitoba the Testators Family Maintenance Act[591] provides for a one year period[592] where

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[585](cont'd) defines "dependant" and "common law spouse" in relationship to 5 years continuous cohabitation or of "some permanence" where there is a child of the relationship. See, Supra, Re Cooper, n.356.

[586]Supra, Holland, n.172 at pp.95-102.

[587]R.S.B.C. 1979, c.121.

[588]Id. s.1(c).

[589]S.N.S. 1965, c.56.

[590]S.N.S. 1970-71, c.65, s.1(2).

[591]S.M. 1978, c.25.

[592]Id. s.11(1).

there is a child of the union. The application must be made within one year of the cessation of cohabitation, which period of time need not be continuous.[3]

The shortest period of time to facilitate eligibility after cessation of cohabitation appears to be in the Yukon that requires application to be commenced within 3 months.[4] Newfoundland provides for a 50% reduction in quantum support if the female has sufficient means.[5]

The Family Services Act,[6] in New Brunswick states:

> (3) [Common-Law Spouses]. - A man and a woman, not being married to each other, who have cohabited
> (a) continuously for a period of not less than three years in a relationship in which one person has been substantially dependent upon the other for support, or
> (b) in a relationship of some permanence where there is a child born of whom they are the natural parents.

As Holland points out,[7] various legislation in Prince Edward Island, Alberta and Saskatchewan do not appear to deal with the rights of cohabitees. Likewise, the new legislation in Ontario under the doctrine of stare decisis rendered past case law redundant. It will be interesting to

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[3](cont'd)
[3]Re Hourie and Pettie, (1974), 45 D.L.R. (3D) 306 (Man.C.A.).

[4]The Matrimonial Property and Family Support Amendment Ordinance, O.Y.T. 1980 (2D) c.15, s.30.6(1).

[5]Maintnenance Act, R.S. NFLD. 1970, c.223 and amendements thereto.

[6]S.N.B. 1980, c.F-2.2 and amendments thereto.

[7]Family Law Reform Act, S.P.E.I. 1978, c.6; Domestic Relations Act, R.S.A. 1980, c.D-37; The Deserted Wives'and Children's maintenance Act, R.S.S. 1978, c.D-26.

see how the courts respond to such comprehensive law reform.

The law with respect to custody, access and adoption has been discussed in some detail.[599] Legislation reflects the concept of what is, "in the best interest of the child", and confirms the paramountcy of such doctrine. The common law position, that the natural mother has prima facie right to custody of the child, makes it extremely difficult for the putative father to make headway in this area.

Certain Acts provide status at law for the natural father to commence an action for custody and access,[600] and in some instances that status even becomes an assurance.[601] As far as Adoption is concerned, the rights of the putative father vary from province to province[602] although it appears the courts are reluctant to dispense with parental consent[603] unless the court feels the parents unfit, or there is parental misconduct.[604]

The right to bring an action for an Affiliation Order is evident in all provinces,[605] and it is abundantly clear

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[599]Supra, Chapter 6(f).

[600]E.g. Saskatchewan Infants Act, R.S.S. 1978, c.I-9 and Ontario Minors Act, R.S.O. 1980, c.292. See Also, Supra, Vandenberg v. Guimond, n.495.

[601]D.A. Cruickshank, "Forgotten Fathers: The Rights of the Putative Father in Canada" (1972), 7 R.F.L. 1 at p.21.

[602]Supra, Holland, n.172 at p.174.

[603]Supra, Re Desmarais, n.535; Supra, Re Kennette and Munro, n.532 and Supra, Re Gardiner, n.537.

[604]E.g. Supra, Re Sharp and Waldron v. Adams, n.536.

[605]E.g. The Child Welfare Act, R.S.A. 1970, c.45 and The Child Welfare Act, R.S.S. 1965, c.268.

that the term "illegitimate" has been eradicated through the various Legitimacy Acts. Cruickshank's opinion with respect to "defacto" relationships, I feel, should be extended to all children, as it indeed has, through progressive, humanistic legislation:[105]

> "If the mother and father have cohabited for a reasonable length of time and are holding themselves out as husband and wife at the time of the birth of their child, that child should be viewed as legitimate."

The provinces have seen fit to enter into various other areas of concern such as Criminal Injuries Compensation,[106] Welfare Payments,[107] Fatal Accident legislation[108] and Workman's Compensation. The latter area, as Foote points out[109] has resulted in haphazard consideration in the compensating of workmen in different provinces. For example, qualifying periods of time are required under the various enactments[110] in a variety of combinations. The Alberta statute requires a two year period of cohabitation[111] contrasted to the Saskatchewan Act which calls for a five

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[104](cont'd)
[105]Supra, n.600 at p.10.

[106]Supra, Pritchard, n.11 at p.147.

[107]Supra, Holland, n.172 at pp.184-185.

[108]Id. pp.179-181.

[109]Supra, Foote, n.488.

[110]Manitoba Workers Compensation Act, R.S.M. 1970, c.W200 and Workers' Compensation Act, S.S. 1979, c.W-17.1, in Saskatchewan.

[111] Workers' Compensation Act, R.S.A. 1980, c.W-15.

year relationship which is further reduced to three years if there is a child of the union.

As can readily be seen, eratic and sporadic provincial legislation can result in territorial disparities. Uniformity is much to be desired in order to ensure that all Canadians, on balance, will have equality before the law.

VIII. Developments in the United States of America Respecting Nonmarital Relationships.

A. A Historical View

At this juncture, the writer will give a brief overview of the status of cohabitees in the United States of America. This position is taken because of the importance of the Marvin decision. It would not be meaningful to omit such discussion especially since the Supreme Court of Canada considered the ramifications of the decision in Pettkus v. Becker on "unjust enrichment". This segment, however, will be in the order of a cursory overview and as such will not deal with the subject matter in any great depth.

As we have seen, common law marriages continue to exist in the United States of America following the decision in Fenton v. Reed.[112] In light of such decision, one would have thought that the courts would be more liberal in the legal recognition of the cohabitation relationship. It would appear that this was not the consensus emanating from the majority of judicial decisions. Weitzman, states that the courts are "reluctant to enforce contracts between unmarried cohabitants"[113] based on the illegality of illicit sexual services,[114] application of market place concepts[115] and the

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[112] Supra, n.35. See also McCullon v. McCullon, 410 N.Y.S. 2D 226 (1980).

[113] Supra, Weitzman, n.185 at p.385.

[114] Vincent v. Moriarty, 31 APP.DIV. 484 (1898).

[115] Supra, Weitzman n.185 at 390.

inadequacy of considerable evidence of the services of the female cohabitee as being "gifts".[116]

Even prior to the Marvin decision, the California courts appeared to be more progressive in the recognition of rights of cohabitees in the areas of the ability to legally contract during cohabitation[117] and where the cohabitees lived as "man and wife".[118] As Douthwaite points out:[119]

> "...where there is an "ostensible family relationship" and the union has been in existence for a substantial period of time...the courts will regard both of the parties, no matter where the legal title lies, as having an equity in some portion of the accumulated assets."

In Fung Dai Kim Ah Leong v. Lau Ah Leong,[120] a Hawaii circuit court granted the female cohabitee equity in property on the basis of thirty five years of cohabitation. This may have been an extreme case since the female cohabitee was unaware of the legal requirements. The union was based on religious beliefs, where she had assisted in a successful business, and where she had conceived thirteen children. Following this line of reasoning, the decision In Re Marriage of Cary[121] was the first case to extend

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[115](cont'd)
[116]Latham v. Latham, 547 P. 2d 144 (1976).

[117]Trutalli v. Meraviglia, 215 CAL. 698 (1932).

[118]Vallera v. Vallera, 21 CAL 2D 681 (1943).

[119]Graham Douthwaite, Unmarried Couples and the Law, Indianapolis: The Allen Smith Co., 1979.

[120] 27 F. 2D 582 (1928).
See also, a modern application in Artiss v. Artiss, 8 FAM. L. REP. (BNA) 1085 (1982).

[121] 34 CAL. APP. 3D 345 (1973).

California's community property system to a cohabitation relationship by expanding the definition of "family". Neilson asserted strong opposition to the decision:[122]

> "The Cary decision is a aberration that raises a myriad of problems. The decision obfuscates California's marital law and distorts the community property system; it should not be relied upon or followed."

It would appear, therefore, that decisions in the American courts prior to the Marvin decision were haphazard at best, and decided on strictly on an ad hoc basis granting relief in cases where it would be unconscionable not to do so.

B. The Marvin Decision

In Marvin v. Marvin[123] the plaintiff, Michelle Triola cohabited with the actor Lee Marvin for a period of five years and seven months during the period October 1964 to May 1970 and was further supported by Marvin until November 1971. Triola alleged a verbal contract that the couple would share equally in property accumulated while living together and that the female cohabitee had given up her career in exchange for the male cohabitee supporting her for life. During the period of cohabitation substantial wealth was

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[121](cont'd)

[122]Patrick A. Nielson, "In Re Cary: A Judicial Recognition of Illicit Cohabitation" (1974), 25 HASTINGS L. J. 1226, p.1229.

[123] Marvin v. Marvin, 18 CAL. 3RD 660 (1976), on remand 5 FAM. L. REP. (BNA) 3077 (1979), appealed 122 CAL. APP. 3D 871 (1981).

accumulated by Marvin. The plaintiff's claim was rejected at trial. On appeal the California Supreme Court reversed the decision. Tobriner, J. was of the opinion:[624]

> "...a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services."

The court held that cohabitees could contract an express agreement unless founded on meretricious sexual services, mere "cohabitation" insufficient for purposes of denial of relief and could be severed from the express contract.

Justice Tobriner approved of "implied contracts"[625] and stated cohabitation did not have the effect of undermining marriage.[626] He further approved of the use of a "resulting trust",[627] "constructive trust"[628] and the doctrine of "quantum meruit"[629] The learned Justice felt the time element was relevant in the determination of an "equitable" remedy leaning ~~towards~~ a "lengthy" relationship.[630]

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[624]Id. p.669. See also, Estate of Thornton, 81 WASH. 2D 72 (1972).

[625]Id. p.684.

[626]Id. p.684. See also,Hyman v. Hyman, 275 S.W. 2D 149 (1954).

[627]Id. p.684. See also, Omer v. Omer, 523 P. 2D 947 (1974).

[628]Id. p.684. See also, Hill v. Estate of Westbrook, 39 CAL. 2D 485 (1952).

[629]Id. p.684.

[630]Id. p.684. See also, Hewitt v. Hewitt, 380 N.E. 2D 454 (1978) and Carlson v. Olson, 256 N.W. 2D 249 (1977).

Having made such strong statements on the rights of cohabitees, Justice Tobriner rejected all the alternatives available to him and granted $104,000 in equity for "rehabilitation" to enable the plaintiff to obtain education or employable skills. On appeal the award was reversed on the reasoning there was "no basis in law" upon which to sustain such proposition.[31]

Folberg, is of the opinion that in order to invoke any of the foregoing remedies and thereby finding, what he terms, a "domestic partnership", the presence of the following would enhance finding for the plaintiff:[32]

- jointly held assets
- joint investment
- joint chequing and savings accounts
- joint credit cards
- voluntary assumption of debts
- pooling of labour
- joint assumption of "child rearing"

Weitzman concluded:[33]

> "In April 1979 the National Law Journal reported that the principles articulated in Marvin were supported in seventeen states, while only four states rejected them."

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[31] Supra, n.623.

[32] Supra, Folberg, n.352 at p.353.

[33] Supra, Weitzman, n.185 at p.396.

C. A Post Mortem: Revelation or Status Quo

Following the Marvin decision a myriad of decisions ensued. One of the cases to distinguish the Marvin decision was McCall v. Frampton.[334] This, a case involving another celebrity, closely reflected the facts in Marvin, with, perhaps an overtone of deception. The female plaintiff had left her husband and job to live with Frampton. A house was chosen by her on the understanding that it was to be placed in joint tenancy but instead it was placed in the defendent's name alone at his insistence. After five years of cohabitation the plaintiff claims that the half interest of the property rights was being held in "trust" for the female cohabitee in accordance with Justice Tobriner enunciated in Marvin. The court was of the opinion:[335]

> "In the first place, the contract between plaintiff and defendant,as pleaded in the complaint, is void and unenforceable as a matter of public policy.... it is patent that plaintiff pleads as the consideration for this agreement the commission of adultery on her part...leaves no doubt that there was an illicit sexual relationship between the parties."

Conversely, in Dosek v. Dosek[336] where the couple held themselves out as "man and wife" and where the court found a "marriage-type" relationship, relief was granted to the plaintiff. Likewise, in Kozlowski v. Kozlowski[337] the court

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[334]99 MISC. 2D 159 (1979).

[335]Id. p.757.

[336]4 FAM. L. R. (B.N.A.) 2828 (1978).

[337]403 A. 2D 902 (1979). See also, Mullen v. Suchko, 421 A. 2D 310 (1980) and Carlson v. Carlson, 256 N.W. 2D 249 (1977).

followed Marvin under an express, enforceable oral agreement. Directly contra to such decision, based on similar duration of fifteen years of cohabitation, was Morone v. Morone,[33] wherein the court held that "housewife" type duties could not sustain the findings of either an express agreement or an implied contract due to "contextually inadequate" facts.

Latham v. Latham[33] stands for the proposition that cohabitation is not immoral and consequently void as against public policy as such sexual implication arising out of cohabitation is equated to "amenities of married life".

Blumberg is of the opinion that:[40]

> In spite of recent case law protestation to the contrary [Marvin] American law treats cohabitation in a lopsided fashion."

Childers and Jennings view Marvin with sarcasm:[41]

> "Despite tremendous media coverage, the Marvin v. Marvin decision was not the beginning of a new area of law dealing with property rights of live-in lovers. This perplexing legal arena existed for over a century before Michele Triola ever met Lee Marvin."

Freeman & Lyon, in my opinion, realistically have

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[33](cont'd)
[33]50 N.Y. 2D 481 (1980). See also, Tapley v. Tapley, 449 A. 2D 1218 (1982).

[33]Supra, p.616.

[40]Grace G. Blumberg, "Cohabitation Without Marriage: A Different Perspective" (1981), 28 U.C.L.A. REV. 1125, p.1137.

[41]B.K. Childers & M.M. Jennings, "Legal Theories Available for a Marvin Case" (1980), 3 FAM. ADVOCATE 30.

appraised the ramifications of the Marvin decision:[43]

> "Marvin recognized that those who cohabit are a variegated group and that only the broadest of rules cover such a disparate category of relationships,"

Hahlo, warns that to compensate a mistress for household services would place her in a better legal position than a wife[43] and Green & Long, look well beyond Marvin and conclude that cohabiting couples can be relatively confident, that although most states have not abandoned the illegal consideration doctrine, they will seek to apply the severance doctrine to uphold express contracts.[44]

Freeman & Lyon conclude that:[45]

> "What we need is a theoretical framework in which policies about cohabitation can be coherently thought out. This needs integration within the politics of family. A thorough appraisal of the law relating to marriage and cohabitation as well as the other kinds of relationships available today is long overdue."

Likewise, Blumberg expresses the obvious:[46]

> "...some parts of the United States are in a period of change and acceptance while the rest of the United States lingers in the first stage, where cohabitation is viewed as deviant."

The writer concludes that the position in the United States of America, due to the large number of varying

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[43]Supra, Freeman & Lyon, n.249 at p.230.

[43]Supra, Hahlo, n.95 at p.4, footnote #330.

[44]Supra, Green & Long, n.10 at p.189.

[45]Supra, Freeman & Lyon, n.249 at p.231.

[46]Supra, Blumberg, n.640 at pp.1130-1131.

jurisdictions, is in somewhat of a "patch-work" of responses to the needs of cohabitees. Following the Marvin decision, the courts have numerous and varied remedies in which to avoid inequities. What is needed is a comprehensive research study to decide an overall policy to be embodied in legislative enactments so as to ensure uniformity, stability, and equitable treatment for cohabitees. The wide discretionary powers inherent in the courts will continue to result in different decisions in similar factual situations. Statutory reform is therefore essential and most desirable.

IX. "Cohabitation Contracts" and the Legality of Agreements Between Nonmarried Cohabitees

A. Historically

Agreements concerning cohabitation have met with resistance from the English courts on the basis of immorality[47] and void as against public policy.[48] The subject matter has been discussed previously[49] with emphasis on agreements actual or "implied". This segment of the thesis is concerned with express written contracts relating to "cohabitation contracts". It has been argued that the legal acceptance of cohabitation contracts would undermine the institution of marriage[50] and will be struck down if made in contemplation of *future* [my emphasis] cohabitation. Freeman & Lyon air this concern:[51]

> "It may be noted that in English law a contract of cohabitation is probably void: but not so a contract between those already cohabiting, although even that may be suspect."

It is blatantly obvious that if the cohabitation contract is based solely on sexual consideration it will be

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[47] *Supra*, Upfill v. Wright, n.280 and *Supra*, Diwell v. Farnes, n.290.

[48] *Supra*, Fender v. St. John Mildmay, n.283.

[49] *Supra*, Chapter VI.

[50] *Supra*, Wade, n.25 at p.15.

[51] *Supra*, Freeman & Lyon, n.249 at p.229.

struck down[312] in England,[313] the United States[314] and indeed in Canada.[315] However, even one of the most conservative advocates of the "status quo" appears to have accepted the rising public opposition to cohabitation as being immoral. Freeman & Lyon comment "[and]...not before time".[316] Commenting on the reconsidered view of the English Law Commission they state:[317]

> "A desire to make, such contracts is a symptom of dissatisfaction with current institutions and laws, and not a cause of it."

The "conservative" approach, in England, however, is still prevalent although greatly qualified:"[318]

> "It seems, although the point has not yet been decided in England, that an express contract between such persons to 'pool' their earnings and acquisitions would not be regarded as contrary to public policy."
>
> "Domestic arrangements between parties to the present group of stable relationships will often not be contracts because they were not made with that intention. But they should not, if the requirements of contractual intention is satisfied, be struck down on grounds of public policy."

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[312] Supra, Freeman & Lyon, n.181 at p.219.

[313] Supra, Fridman, n.460 at p.334.

[314] Supra, Marvin v. Marvin, n.623. See also, Supra, Doutwaite,n.619 at p.157.

[315] Supra, Prokop v. Kohut, n.389.

[316] Supra, Freeman & Lyon, n.281 at p.215.

[317] Id. p.220.

[318] G.H. Treital, The Law of Contracts, 6th Ed., London: Stevens & Sons, 1983, p.335.

In Canada, MacDougall appears to have correctly assessed the situation:[58]

> "Cohabitation without marriage is still considered immoral but modern cases tend to minimize the sexual aspects of the relationship."

B. Contemporary; Present Day Concerns

Modern concerns appear not to involve "immorality" or "public policy" arguments but rather the application of contract law to domestic arrangements. It has been argued that cohabitation is not a threat against marriage,[59] and, as Poulter states:[60]

> "The time would seem to have arrived when the general consensus of opinion is that a judge faced with a cohabitation contract should uphold it rather than make an adverse moral judgment on the parties' sexual behavior."

Wade, places "cohabitation contract" in a realistic modern setting:[61]

> " "...a cohabitation contract is not an incentive to divorce if the marriage of the married cohabitant is beyond redemption..."."

Surprisingly, one leading Canadian authority in "Contract Law" has failed to even address the subject matter,[62] while other authors echo the age old problem of

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[58] Supra, MacDougall, n.253 at p.316.

[59] Supra, Barton, n.176 at p.44.

[60] Sebastian Poulter, "Cohabitation Contracts and Public Policy" (1974), NEW L. J. 999 & 1034, p.1036.

[61] Supra, Wade, n.215 at p.16.

[62] G.H.L. Fridman, First Supplement to the Law of Contracts in Canada, Toronto: Carswell, 1980.

the unequal position of one of the parties to a contract. That is, either undue influence[14] or an overpowering position on behalf of one of the parties.[15]

Two leading American antagonists on the subject matter are Weitzman[16] and Oldham.[17] In a rather lopsided approach to the situation, Weitzman decries the plight of women in a "sexed based" society.[18] She deemphasizes the "emotional" and "love" aspects of living together in marriage and cohabitation arrangement, and boldly states:[19]

> "...far from spoiling romance, a marriage contract is an essential prerequisite to preserving it, since romance has a way of evaporating when misunderstandings about roles and responsibilities arise."

Oldham, obviously taking offence to Weitzman's "anti male" stand with respect to marriage and cohabitation contracts, cleverly uses Weitzman's own articles to discredit her major work. He states:[20]

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[13] Mundinger v. Mudinger, [1969] 1 O.R. 606 (ONT.C.A.) affirmed 14 D.L.R. (3D) 256A (S.C.C.) and Valta v. Valta (1978), 8 R.F.L. (2D) 133 (B.C.C.A.). For an opposing view see: Nightengale v. Nightengale (1978), 1 F.L.R.R.72 (ONT.S.C.).

[14] Supra, Blumberg, n.640 at pp.1160-1163 and Supra, Shultz, n.290.

[15] Supra, Weitzman, n.185.

[16] J. Thomas Oldham, "Book Review: The Marriage Contract, by Lenore Weitzman: MacMillan Publishing Co. (1981) pp.536 $17.95" (1983), 54 U. COLO. L. R. 469.

[17] Supra, Weitzman, n.185 at pp.227-228.

[18] Id. p.240.

[19] Supra, Oldham, n.667 at p.474.

"Some of these matters have been considered by her in great depth in recent journal articles. I therefore will refer to these articles to attempt to clarify certain statements made in her book."

The argument is amplified:[71]

"Any person involved in an intimate relationship and particularly those planning to marry, would benefit from reading this book. In addition to the painstaking description set forth in the book of the problems suffered by women during marriage and at divorce, absent on antenuptial agreements. The Marriage Contract highlights various matters that prospective spouses would be wise to discuss."

Tongue-in-cheek, Oldham concludes:[72]

"After such matters are discussed, prospective spouses should have a better idea whether they have similar life plans, goals and expectations."

Weitzman, in somewhat of an emotional retort, leaves one to be grateful for the fact that these two apparent scholars were never married to one another or even cohabitees:[73]

"His obvious disdain [Oldham's] for normal standards of scholarship suggests that his interests do not lie in the realm of scholarly discourse. Rather, he appears to have nominated himself to review this book in order to express his ideological views about divorce."

Further, showing emotional inadvisable temperament, Weitzman, after referring to "Mr. Oldham's emotional argumentation", herself offers evidence of such malady:[74]

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[71] Id. p.501.

[72] Id. p.501.

[73] Lenore Weitzman, "A Reply to Professor Oldham" (1983), 54 U. COLO. L. R. 503.

[74] Id. p.503.

> "(Incidentally, it is clear that Mr. Oldham could benefit from an elementary course in statistical analysis before he charges on to defend his prejudices. I am confident such courses are available to him in Texas.)."

The writer respectfully submits that the foregoing arguments are illustrative of the emotions associated with "living together" and "cohabitation contracts." The subject matter naturally invites conflict between traditional values and societal changes. Legislative enactments therefore should, in my opinion, allow citizens a choice facilitating their own preferences. Indicative of such reasoning is The Matrimonial Property Act[77] in Newfoundland. It would appear that this Matrimonial Act allows cohabitees to opt for the provisions of the act via a cohabitation contract.[78] Other provincial legislation affecting cohabitation agreements, in varying degrees, are herein listed.[79] O'Hoski further reflects the writer's attitudes with respect to such legislation and proposed future enactments:[80]

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[77]S.N. 1979, c.32 ss.32,33 and 34.

[78]Supra, Girard, n.358.

[79] Family Relations Act, S.P.E.I. 1978, c-6,ss.S2,S3.
Marital Property Act, S.N.B. 1980, c. M-1.1,ss.35,36.
Family Relations Act, R.S.B.C. 1979, c.121,s.74.
Family Maintainance Act, S.M. 1978, c.25,s.10.
Matrimonial Property Ordinance, O.Y.T. 1979, (2nd) c.11,s.36.
New Ontario Legislation reveals many new possibilities: Supra, n.323.

[80]J.J. O'Hoski, "The Legal Recognition of Domestic Contracts: The Experience of Ontario" reprinted in J.M. Eekelaar & S.N. Katz (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworths, 1980, p.234.

> "...courts should, in the true spirit of the legislation, encourage the use of domestic contracts. Otherwise, lengthy and costly legislation will not be avoided and the freedom to contract out of the legislation will be meaningless."

Contract law has to be viewed with mixed blessing. Gallen et al. are of the opinion that the presence of a contract, even if there are legal issues to be dealt with, ultimately reduces complications that are associated with the uncertainty of the present law.[77] Flexibility is a prime consideration[80] and contract could be "tailor-made" to suit individual means.[81] Opposed to such reasoning is that situations change giving rise to the question; Should a party be held to a contract made at the beginning of a relationship?[82] Also negotiations of contracts always favour the more educated, powerful or the rich. Albano's reasoning is highly persuasive:[83]

> "The contractual and property rights of Americans [and Canadians] who live together without marriage continue to evolve as courts adopt outmoded doctrines to fit contemporary needs. While some states continue to view cohabitation as immoral and against public policy favouring marriage, and deny relief on the basis, most courts are concluding that unmarried partners should not risk losing vital rights because of their life-style."

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[77] Supra, Gallen et al., n.19 at pp.1-7.

[80] Alec Samuals, "The Cohabitee's Home" (1984), 14 FAM. L. 282 at p.285.

[81] Supra, Freeman & Lyons, n.181 at pp.52-54.

[82] Id. p.210.

[83] Michael Albano & Donald C. Schiller, "Cohabitation Without Formal Marriage in the USA" (1986), 16 FAM LAW 43 at p.46.

CONCLUSION

There can be little doubt that cohabitation has increased significantly in modern society. Statistics discussed in Chapter V,[1] clearly show that the phenomenon is gaining popularity and perhaps even has attained social acceptance. The position in the United States of America, which has been shown, on the basis of sparse empirical studies, appears to be considerable less a growth factor than in Canada.[2] Even so, Weyrauch, was moved to comment:[3]

> "The vitality cannot be doubted; we witness a social experiment of gigantic proportions outside the halls of scholarship".

S. Parker, echoes the writer's sentiments:[4]

> "Thus the subject of cohabitation is ripe for study from a number of perspectives: historical, sociological as well as legal."

The shortage of comprehensive research studies gives credence to Oliver's observation that, "The couples seemed to be surprisingly unaware of the legal difference,[5] such position being supported by Barton.[6]

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[1] Chapter V, pp.53-67.

[2] Id. p.61.

[3] Walter O. Weyrauch, "Metamorphoses of Marriage: Formal and Informal Marriage in the United States reprinted in: J.M. Eekelaar & S.N. Katz (ed.), Marriage and Cohabitation in Contemporary Society, Toronto: Butterworths, 1980, p.275.

[4] Supra, Parker, n.37 at p.4.

[5] Dawn Oliver, "Why Do People Live Together?" (1982), JOURNAL OF SOCIAL WELFARE LAW 209 at p.215.

[6] Supra, Barton, n.176 at pp.6-9.

Part of the difficulty in understanding the phenomenon, is that the term encompasses a complex continuum of relationships that range from uncommitted roommates to intimate monogamous relationships virtually indistinguishable from the traditional legal marriage.'''° Consequently, perhaps the spectrum is so immense as to defy definition.'''¹

There appear to be two extremes of viewpoints on how the law should approach dealing with the concept of cohabitation and the resultant legal dilemmas of the cohabitees. At one end of the continuum, are those who advocate treatment of cohabitation as "marriage-like" relationships and accord some appropriate status.'''² Opposed, are those who advocate autonomy with no legal incidence, based on the rejection of marriage,'''³ diversity of individual choice'''⁴ or simply as an alternative to marriage.'''⁵

The increase in cohabitation has given rise to fears

'''(cont'd)

'''°Supra, Caudill, n.198 at p.545.

'''¹Chapter II, pp.12-13.

'''²Supra, Oliver, n.688 at pp.209-210. See also, Susan H. Blake, "To Marry or Not to Marry" (1980), 10 FAM. LAW 29 at pp.45-48.

'''³Supra, Deech, n.191 at p.310 and Supra, Freeman & Lyon, n.181 at p.120.

'''⁴Supra, Zuckerman, n.309 at p.279.

'''⁵Supra, Parry, n.371 at p.148.

that the institution of marriage will be weakened'''' or even replaced.''''' Fain, and Folberg, are of the following, respective, opinions:''''

> "...increased society's recognition that the probability that marriage will last one's lifetime is very small; More than one marriage during an individual's lifetime or the equivalent in nonmarital relationships is becoming increasingly common."
>
> "While society continues to pay lip service to the idea of the traditional long-life marriage, alternative familial and economic relationships proliferate."

Whatever direction society and the legal system will move in the future is one of speculation. However, cohabitees face immediate legal problems emanating from unpredictable responses of the Courts, as well as the Legislatures, in the determination of the legal consequences of cohabitation. The writer will therefore summarize the results of this research thesis before examining the concepts of legal marriage, common law marriage, and cohabitation in terms of futuristic juristic considerations.

The position of a cohabitee with respect to wills is somewhat precarious. There is no onus on a fellow cohabitee to name the other cohabitee as a beneficiary under the terms

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''''<u>Supra</u>, Glendon, n.183.

'''''Stephen M. Cretney, "The Law Relating to Unmarried Partners From the Perspective of a Law Reform Agency" reprinted in: J.M. Eekelaar & S.N. Katz (ed.), <u>Marriage and Cohabitation in Contemporary Society</u>, Toronto: Butterworths, 1980, p.359.

''''<u>Supra</u>, Fain, n.207 at p.2 and <u>Supra</u>, Folberg, n.352 at p.346.

of a will and indeed, "stranger" beneficiaries may be changed at the whim of the testator. The only advantage appears to be that the cohabitee who witnesses the will of the other cohabitee is not precluded from inheriting, as would be a legal spouse.

A more equitable way in which to ensure passage of property rights would be through the medium of an irrevocable trust, inter vivos, wherein the donor would retain a "life interest" during his or her existence, transferable to the recipient cohabitee upon death.

Likewise, under a life insurance policy it is imperative that legislation provide a cohabitee with an "insurable interest" as of right, or alternatively, the recipient cohabitee should be expressly named, in order to avoid the ambiguity surrounding the terms "spouse" or "wife" especially where there is a subsisting legal marriage of one of the cohabitees.

Claims against a deceased cohabitee's estate have not met with much success. Apparently, as the Alberta study[''' indicated, there is a weak response regarding claims against an estate. Succession of property to illegitimate children has conversely solicited strong support. It is therefore essential that children are protected, as indeed they are, under provincial legislation.'[''' Furthermore consideration

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[''']Supra, The Institute of Law Research and Reform, Edmonton, Alberta, n.187 at p.89.

[''']See Chapter VII, pp.126-139.

should also be given to relationships of a "permanent" nature, with express provisions that the court should exercise, in support of providing protection, whenever it is equitable to do so.

At common law the cohabitee has no rights to support during the period of cohabitation, with the courts vascilating when considering the period of cohabitation prior to marriage of the cohabitees. Notwithstanding the influence of Marvin v. Marvin[101] the courts have been reluctant to award even "rehabilitation" support payments. It has been through legislative enactments that certain types of relief have been actionable. Unfortunately, provincial legislation[102] has been "piece-meal" with the resultant consequence of wide disparities throughout Canada. Standardization is needed in order to ensure equitability.

In the area of Custody, Access and Adoption it is apparent that the court will exercize its judicial discretion in the "best interests of the child". In the majority of cases this will result in custody to the mother.[103] Access to the putative father, has proven to be an unpredictable battlefield,[104] the natural father being on very shaky ground. Perhaps, with the growing awareness that the child should have the right to know his natural

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[101] Supra, Marvin v. Marvin, n.623.

[102] See Chapter VII, at p.131.

[103] Supra, Cruickshank, n.600 at p.703.

[104] See Chapter VI, pp.113-125.

father,'[105] the courts will grant access to more putative fathers. I am of the opinion, that the right to access should be one of right unless the facts disclose it would not be in the "best interest of the child". Adoption proceedings should be viewed with the utmost of caution and notice to the natural father or mother only dispensed with in extreme cases.

It would appear that cohabitation agreements in modern society would not be held to be in the furtherance of immorality'[106] and certainly not void as against "public policy", as such are antiquated concepts.'[107] "Cohabitation Contracts" would provide the necessary vehicle for security although traditionalists would view use of such contracts with disdain.'[108] It is highly unlikely, that their use will ever become extensive, as statistics support'[109] the proposition, that even where the right exists, few people take advantage of the situation. The argument, that since terms and conditions in a relationship constantly change, a contract would be quickly outdated, could be easily answered

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'[105]Jeffrey M. Shaman, "Legal Aspects of Artificial Insemination" (1980), 18 J. FAM. L. 331 at p.334.

'[106]Iain Ramsay, "Annotation - Contractual and Quasi Contractual Claims Against Estates of Deceased Persons for Services in the Home" (1977), 1 E.T.R. 211 at p.217.

'[107]See Chapter VI, pp.68-78.

'[108]For total disdain, see Supra, Fridman, n.460 and Supra, Fridman, n.663.

'[109]Supra, The Institute of Law Research and Reform, Edmonton, Alberta, n.187 at p.89.

in terms of treating such contract as a "living will". Wills are reviewed whenever substantial changes occurr, and in any event, every two to three years. I believe "Cohabitation Contracts" should be approached in like manner. Rights to freely enter into such agreements should receive immediate legislative attention.

With the advent of the Supreme Court of Canada's decisions in Pettkus v. Becker[110] and Sorochan v. Sorochan,[111] it would appear that the courts have ample discretion under the doctrine of "unjust enrichment" in which to render equitable decisions. In any event, in the vast majority of cases, the only "family" asset is the residential home and adverse decisions in this regard could be eliminated by placing title in joint names. Personal property appears not to present the courts with problems, equality being evident.[112] Keene, recommends that all property should be deemed joint unless specifically stated to be otherwise.[113]

Statutory enactments have been sporadic in Canada[114] and such situation has created disparity between Canadians based upon residency. What is required is a comprehensive, cooperative and interprovincial research study to thoroughly

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[110]Supra, n.351.

[111]Supra, n.574.

[112]See Chapter VI, pp.93-95.

[113]Supra, Keene, n.462 at p.483.

[114]See Chapter VII. pp.131-139.

assess the position of cohabitation in modern society. Uniformity is badly needed to ensure equitable treatment before the law, for all Canadians, regardless of territorial location. Especially in need of revision is "privileged communications" under the Canada Evidence Act and other appropriate provincial legislation. Decisions such as Ex Parte Cote[115] are a blight on the judicial system, consequently, the privilege should be abolished or alternatively extend to include common law marriages and nonmarital relationships of "some permanence".

The situation in the United States of America following the decision in Marvin v. Marvin appears not to have proceeded with any degree of certainty. Reaction has been mixed with decisions restricting or expanding the principles enunciated in such decision. Weyrauch & Katz, appear to have assessed the situation realistically:[116]

> "In American law, extra legal marital patterns were absorbed gradually into the legal system, and today informal marriage has become more prevalent in all segments of the population than it has been for generations."

It is the contention of the writer that Canadian courts could hold that common law marriages can be entered into in Canada, on the basis that Lord Hardwicke's Act and the

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[115] Supra, n.139. See also, R. v. Williams (1921), 37 C.C.C. 126 (B.C.S.C.); R. v. Coffin (1954), 19 C.R. 222 (QUE.Q.B.) and Robson v. Robson, [1969] O.R. 857 (S.C.).

[116] W. Weyrauch & S. Katz, American Family Law in Transition, Washington D.C.: The Bureau of National Affairs, Inc., 1983, p.115.

Millis decision have no application under Canadian law.'[117] It is also clear that the incidence of nonmarital cohabitation is now a sizable dilemna.'[118] and proliferating rapidly. Conversely, it would appear that traditional legal marriage is being affected by nonmarital cohabitation, although the situation is difficult to assess. This is especially true, in the light of inadequate and almost nonexistent research studies, the Alberta Study'[119] being the exception to the rule. Based on divorce statistics, Temple, voices strong opinions:'[120]

> "The sexual revolution has led to acceptance of cohabitation as an alternative to traditional marriage."

He further states: "The law has had no choice but to react to cohabitation"'[121] and based on the fact that marriage has lost many of its social and economic functions, is of the opinion, "...permanence in marriage no longer represents the norm".'[122] Skolnick, wistfully ponders the problem:'[123]

> "Thus, whether or not marriage "survives" may not be a very meaningful question.... It seems likely that

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'[117]See Chapter IV, especially pp.51-52.

'[118]See Chapter V, pp.53-67.

'[119]Supra, n.187.

'[120]Gregg Temple, "Freedom of Contract and Intimate Relationships" (1985), 8 HARV. J. OF LAW AND PUBLIC POLICY 121 at p.121.

'[121]Id. p.136.

'[122]Id. p.151.

'[123]Supra, n.184 at pp.355-356.

> for most people marriage is "a symbolic" statement of commitment and self-identification.... although marriage may be withering away, the family forms changing, "intimate association" is here to stay."

Crutchfield, also airs his concern and the lack of meaningful response:[724]

> "...nonmarital and marital relationships can coexist in our society without destroying or abolishing traditional views of marriage and the family structure...there is an urgent need to redefine these human relationships rather than to impose a penalty because of their unconventional existence."

Glendon, is of the opinion:[725]

> "If legal marriage is gradually being deprived of legal effects, then the legal and social institutions of marriage may be converging even without attribution of legal effects to cohabitation."

Blumberg, advocates partial assimulation:[726]

> "I propose a simple solution: assimulate cohabitants to married persons for purposes of maintenance, property division, intestacy and elective share statutes. When cohabitation ends other than death, there is cause to test the stability of the relationship, that is, to assure that the relationship was more than casual. Hence, I propose that, for purposes of maintenance and "divorce" - related property division, a cohabitation of two or more years' duration or a cohabitation of any duration in which there is a child born to the parties be treated as though it were a lawful marriage."

Jan Trost, the renown International researcher and scholar, in a study of 111 cohabiting couples, together with many other European studies, came to the conclusion: "there are no differences between unmarried cohabiting couples and

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[724] Supra, Crutchfield, n.218 at p.259.

[725] Supra, Glendon, n.183 at p.697.

[726] Supra, Blumberg, n.640 at p.1166.

married couples."[127] 93% of the cohabiting couples stated there was not perceived pressure to marry[128] and 98% of the men and 91% of the women saw no disadvantage to cohabitation.[129] Inconceivable, as it may seem to Western civilization, the most often asked question in Sweden and Denmark, is not, - Why are you cohabiting but rather why did you marry?[130]

Whether legal marriage and cohabitation will be assimilated or simply coexist is the subject matter of further treaties. What is evident from this humble attempt, is that, if one were to consider marriage at one extreme and cohabitation at the other in relationship to a "socially acceptable" continuum of alternate lifestyles, then, it is the contention of the writer that both concepts are moving away from their extreme positions, being drawn inwardly by social pressures. It is the position of this thesis that somewhere between the two entities there exists the common law marriage. In my opinion, this somewhat "mid point" is the legal thread between all of the concepts, as all entities involve some form of "cohabitation".

Society has undergone a tremendous move away from the formalities in all areas of life, and I feel, that

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[127]Jan Trost, Unmarried Cohabitation, Vasteras: International Library, 1979, p.131.

[128]Id. p.84.

[129]Id. p.133.

[130]Id. p.79.

nonmarital cohabitation is not indicative of a backlash against tradition, but rather, an expression of informal behavior. As Weyrauch pointed out, some 26 years ago, formal marriage, in modern times, offers little more personal security than common law marriages.'[731]' However, there are decided legal differences when considering common law marriages and cohabitation in relation to legal marriage, as this thesis has clearly shown. One is forced to ask, I would hope, - What is more harmful to society, common law marriage or nonmarital cohabitation? If "committment" is one of the salient factors for a stable environment, then obviously the former. If, indeed, marriage is withering away, as some predict, then I for one, feel confident that the law will adapt and acknowledge that it is not the formalities but the substance of the relationship that will ensure societal stability.

In conclusion, I share MacDougall's profound concerns, and hope that social, political and legal reformers will react in the most equitable manner possible to ensure that all Canadians, regardless of their lifestyle, will not be treated as second class citizens: '[732]'

"My concern is to emphasize that decisions about the

'[731]'Walter O, Weyrauch, "Informal and Formal Marriage - An Appraisal of Trends in Family Organization" (1960), 28 U. CHI. L. R. 88 at p.104.

'[732]'Donald MacDougall, "Policy and Social Factors Affecting the Legal Recognition of Cohabitation without Formal Marriage" reprinted in: J.M. Eekelaar& S.N. Katz (ed.), Marriage and Cohabitation in Contemporary Society, Roronto: Butterworths, 1980 at p.320.

legal recognition raise fundamental social and political issues. Thus decisions about particular situations need to be made in the context of some broader conceptualization of what sort of society we wish to have"

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